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No. 94-97

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOHN B. TAYLOR, WARDEN,
STAUNTON CORRECTIONAL CENTER,

*Petitioner,*

V.

WILLIAM EVANS-SMITH,

*Respondent.*

**Brief in Opposition to the Petition for Writ of Certiorari to the Judgment of the United States Court of Appeals for the Fourth Circuit**

## BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## JURISDICTION

Under the guise of seeking a grant of certiorari to review a decision of the Fourth Circuit Court of Appeals deemed "extremely important to the administration of justice," *Petition for Writ of*

*Certiorari*, p. 29, Petitioner invokes the limited jurisdiction and scarce resources of this Court to review a fact-specific decision that neither establishes new or controversial principles of law nor conflicts with a decision of another United States court of appeals on the same matter. In fact, the decision of the Fourth Circuit Court of Appeals in this case is not only legally unremarkable, it is correct on the merits of the underlying claim.[1]

Rule 10.1 of the Revised Rules of the Supreme Court of the United States provides that:

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[1]It is so unremarkable that not a single judge of the entire United States Fourth Circuit Court of Appeals requested a poll on Petitioner's suggestion for rehearing *en banc*. Federal Rules of Appellate Procedure, Rule 35, provides that any judge, not only those on the panel, may request such a poll.

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

"Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public ... and in cases where there is *real* and *embarrassing* conflict of opinion and authority between courts of appeals.'" NLRB v. Pittsburgh S.S. Co., 340 U.S. 498, 502 (1951) (Citations omitted). In reality, no conflict exists between the decision of the Fourth Circuit Court of Appeals in the instant case and those of other federal courts of appeals, much less a conflict both "real" and "embarrassing".[2] Although Petitioner cre-

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[2]Upon factual review of other habeas corpus cases on sufficiency grounds, the Fourth Circuit Court of Appeals has evaluated the cases under the same Jackson

atively presents his claim in the intellectually enticing rubric of the "new rule" doctrine, his fundamental underlying complaint is that the Court did not accept at face value the strained and even improbable "inferences" and conclusions which he urged upon it.

The potential for reviewing intellectually interesting, albeit in this case fictitious, issues, however, is not a basis for granting a writ of certiorari. Rice v. Sioux City Memorial Park, 349 U.S. 70, 74 (1950). The Supreme

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standard as applied in this case, but with the resulting conclusion that the evidence was sufficient. E.g., Goldsmith v. Witkowski, 981 F.2d 697, 701 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 3020 (1993); Stamper v. Muncie, 944 F.2d 170, 174 (4th Cir 1991); and United States v. Tresvant, 677 F.2d 1018, 1921 (4th Cir. 1982); . The Court cited these cases in its decision in this case. Thus, if Petitioner's argument is correct, the Fourth Circuit Court of Appeals does not understand its own decisions.

Court has traditionally refrained from doing what Petitioner has asked it to do in this case, granting a writ of certiorari merely to review evidence or inferences drawn from that evidence. General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178, *adhered to* 305 U.S. 124, *reh. den.* 305 U.S. 675 (1938).

## STATEMENT OF THE CASE

### A. The Proceedings Below

The proceedings of this case are set forth in the opinion of the United States Fourth Circuit Court of Appeals (Petition, p. 2A-3A). The Respondent is a 74 year old man, who has spent the past five years of his life in the Virginia Department of Corrections for a crime he adamantly maintains he did not commit.

1. Petitioner has briefly stated the criminal and civil appellate record of this case in his Petition, p. 4. However, Respondent takes issue with Petitioner's characterization that "[r]espondent's first conviction was reversed by the Court of Appeals of Virginia when it ruled that the trial court had erred in admitting certain evidence involving the victim's statements that her husband had tried to kill her and describing his anger and hostility" (Id.). This is an incorrect statement of fact and a blatant attempt to bias this Court. In fact, the only hearsay testimony concerning a purported attempt by Evans-Smith to kill his wife had actually been deemed inadmissible *by the trial court* upon voir dire of the witness at the first trial. Consequently, there was no such testimony at

trial. Evans-Smith v. Commonwealth, 5 Va. App. 188, 361 S.E. 2d 436 (1987) (Reply, p. 1A, 15A-17A)[3]. The Virginia Court of Appeals observed that:

> "In excluding the victim's statement to Cook that, 'Your father tried to kill me last night,' the trial court correctly ruled that this constituted an inadmissible opinion. We believe the victim's other statements to her daughter and her friends were likewise inadmissible opinions."

(Reply, p. 30A).

2. During the proceedings on Respondent's Federal habeas corpus petition, Respondent initiated an additional habeas corpus proceeding in the State trial court as the result of newly discovered exculpatory evidence which had been withheld by the prosecution. The State petition was based upon the discovery by the

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[3]The appendix to this Brief in Opposition shall be referenced throughout this document as Reply, p. ___A.

defense of a previously unknown witness, Karen Spalding. On the morning of the murder in question, between the hours of 7:30 a.m. and 8:00 a.m., Ms. Spalding observed a suspicious, blond haired man walking near the Evans-Smiths' farm gate as she passed that way by vehicle when taking her daughter to school. She was stopped during an April 16, 1985, road check by Loudoun County sheriff investigator Jay Merchant and was questioned about her observations the day before, and remembering later that day she had seen this suspicious man, she relayed the information to Merchant by telephone.

Subsequent to an extensive hearing on the issues, the trial court in a February 1, 1993, letter opinion ruled that although "...[t]he information given to Merchant by Spalding is clearly exculpa-

tory evidence," under United States v. Bagley, 105 S.Ct. 3375 (1985), the evidence was immaterial, in spite of the entirely circumstantial nature of the case. (Reply, pp. 67A-112A).[4] Evans-Smith

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[4]In pertinent part, the trial court stated:

> "Even though the case against Evans-Smith was entirely circumstantial, there was sufficient circumstantial evidence presented at trial to convict him. There is no need to review that evidence here as this Court reviewed it in detail in its opinion letter of July 21, 1989 when the motion to set aside the verdict for insufficient evidence was denied. This ruling has been reviewed by the Court of Appeals and the Supreme Court of Virginia, and neither court reversed that decision.
>
> "The jury heard evidence of at least two other suspicious incidents and/or persons near in place and time to the murder but found the Petitioner guilty. This Court is of the opinion that even if the jury had received evidence of a suspicious unknown person with blond hair on Route 725 near the Evans-Smith farm on the morning of the murder, the result would have been the same despite the evidence of one blond hair

appealed the denial of the requested writ to the Virginia Supreme Court, which petition was denied on October 26, 1993. He then filed a petition for writ of certiorari to this Court, which request was denied on March 7, 1994. Evans-Smith v. Taylor, 114 S.Ct. 1221 (1994) (Reply, p. 113A).

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> of unknown origin (not forcibly removed, but fallen out) found on the stairway leading to the bedroom where Barbara was found and one hair of unknown origin found near her hand. There was no evidence of a forced entry. There was no evidence of any outside dirt, mud or moisture being tracked inside the house. The Commonwealth's forensic scientist, Deanna Dabbs, testified at length at the trial about how unknown miscellaneous hairs can be present at a crime scene. This Court is of the opinion that even if the jury had heard Spalding's testimony, there is no reasonable probability that the outcome would have been different."

Reply, pp. 105A-107A.

B. The Facts In This Case

The facts of this case have been iterated in accurate detail in the opinion of the United States Fourth Circuit Court of Appeals (Petition, pp. 3A-17A). Respondent notes that Petitioner's version of the facts often deviates from the Fourth Circuit Court of Appeals review of the record as well as the record itself.

As required by Rule 15, Revised Rules of the Supreme Court, the following is a discussion of facts which the Respondent represents are misstated in Petitioner's rendition of the facts of this case, whether appearing in the Petition's *Statement of the Case* or in the text of his argument.

1. Petitioner asserts that the Evans-Smiths' daughter, Lesleigh Cook, arrived at the farm the morning of the

murder between 10:30 and 11:00 a.m. (Petition, p. 5). In fact Mrs. Cook's testimony at trial is that she arrived no earlier than 11:00 a.m.[5] (R. 1161). Another prosecution witness, William Laycock, testified that at 10:30 a.m., on April 15, 1985, Mrs. Cook was visiting with him on the road for about a half an hour prior to going to her parents' farm. (R. 243). Moreover, the testimony of others corroborate this time-frame. (R. 274, 278, 290, and 293). The apparent purpose for Petitioner's attempt to place Mrs. Cook at the crime scene prior to 11:00 a.m. would be to provide an explanation why a neighbor saw and heard some

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[5]The Fourth Circuit Court of Appeals appropriately notes that the time was approximately 11:00 a.m. (Petition, p. 5A).

one leaving the Evans-Smiths' driveway earlier that morning. (R. 1449-1453).

2. Petitioner misrepresents that Mrs. Cook used her CB to summon two men (Petition, p. 5). The evidence is that she used the CB to tell her friend, William Laycock, what she had seen at her parents' house, and he agreed to call the house to see if Mrs. Evans-Smith would answer the telephone. (R. 1165-1166). It was Mr. Laycock's decision, when no one answered the telephone at the Evans-Smiths' farm, to come to the farm and to bring with him Robert Brown. (R. 243-245).

3. In his Statement, Petitioner asserts that, while Brown, Laycock and Cook were "[s]earching the house," one of them found Mrs. Evans-Smith's body. (Petition, p. 5). However, the actual

testimony is that the three of them entered the house through the kitchen, and Brown went directly upstairs *after being told by Mrs. Cook that her mother's room was up the stairs*, while Cook and Laycock remained at the bottom of the stairs. (R. 246-248, 274-276, 1167). There was no testimony that Brown went to any room other than Mrs. Evans-Smith's bedroom.

4. Petitioner misstates the evidence that the medical examiner who conducted the autopsy (James C. Byer, MD.) "was of the opinion that a pair of panties stuffed in the victim's mouth [(a)] as if to gag her screams [(b)] had ... been placed there after death." (Petition, p. 5).

(a) Nowhere in the trial record is there a statement by Dr. Byer concerning an opinion on the purpose for the place-

ment of the panties in the victim's mouth. (R. 714-744, 1776-1778)(See also, Reply, pp. 114A-116A). However, Respondent concedes that the fact the panties were found in her mouth creates a reasonable inference that they were used as a gag.[6]

(b) There is no testimony by Dr. Byer that establishes directly or by inference that he believed the panties had been placed in the victim's mouth after her demise. (Reply, p. 114A-116A). The stipulation of his opinion introduced at trial related to blood observed in the victim's ear from a crime scene photograph. Byer opined that the blood like fluid "could have flowed into the ear

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[6]The Evans-Smith farm is relatively remote in rural Loudoun County, and there is no evidence in the record that any one reported hearing the victim scream.

during the time the ligature was put on or at a substantially later time. I have no opinion as to when it actually happened." (Reply, p. 115A). The only qualification he expressed was:

> "If the material in the ear came from the mouth, the gag was placed in the mouth after the initial discharge from the mouth because if the gag was there first, it would have undoubtedly absorbed the material."

(Id.) What the prosecution did not ask the Doctor to clarify at trial was whether or not she may have been alive and conscious during what Dr. Byer characterized as the "initial discharge."[7] Without such a clarification, none of this evidence establishes or creates an infer-

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[7]It is clear from the evidence that at some time after the ligature was placed upon her neck, Mrs. Evans-Smith was sufficiently conscious to attempt to remove it, causing the deep gouges found by Dr. Byer on the left front side of her neck. (R. 719).

ence, let alone a "reasonable" inference, that the panties could only have been placed in the victim's mouth after her demise.

5. Petitioner makes the unreasoned observation that a button from the victim's nightgown found on the floor near her bed suggests "that the nightgown had been ripped open in the bedroom *rather than earlier during the assault.*" (Petition, p. 5)(emphasis added).[8] The relevance of this qualification to Respondent's alleged guilt is unclear. The statement seems to imply that there is evidence that the "assault" on Mrs. Evans-Smith had in some way ended prior to

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[8]The fact that there was no evidence from the victim's robe and nightshirt on the stairs, including any buttons, substantially undercuts the prosecution's theory that Mrs. Evans-Smith was dragged by her ankles up the stairs by one person.

the robe being ripped open in her bedroom, of which there is no evidence. Regardless, the button issue raised by Petitioner creates no evidence or inference that could contribute to a finding of Respondent's guilt.

6. Petitioner characterizes Respondent's bedroom as "tidy except for items of his jewelry which had been laid out across his bed." (Petition, pp. 5-6). There is nothing in the record of testimony that "jewelry" was laid out across Respondent's bed, only that the contents of two wooden boxes, which officers characterized as what appeared to be "jewelry" boxes were found on Respondent's bed. (R. 336, 376, 536-537). In fact there is no characterization of what the contents of the boxes were on the bed in any testimony at trial, although a photograph

was submitted into evidence reflecting the scene.

7. Petitioner states that the table at the foot of the stairs had been laid on its side, defying the laws of physics. (Petition, p. 6). The problem is that no one at trial described in his testimony that the table was laid there as opposed to having fallen there, and no expert testified that the table could not have fallen in the manner it did. Consequently no reasonable inference could be drawn from the position of the table. Whatever the case, the table was located near the foot of the stairs up which the Commonwealth theorized that Mrs. Evans-Smith was forcibly taken. Considering the location of the table and the narrowness of the hall in relation to the stairwell, it seems unlikely that the murderer(s)

could have maneuvered Mrs. Evans-Smith through that portion of the hallway without upsetting the table, whether she was being dragged or not.

8. In several places in the petition, Petitioner attempts to quantify Dr. Hocker's estimate of the time of death as more likely being 6:00 a.m., than within the range of 4:00 a.m. to 8:00 a.m. (Petition, pp. 6, 23, and 27). In reality, there was nothing in Dr. Hocker's testimony that indicates that 6:00 a.m. was any more likely than 8:00 a.m. (R. 924-1346.) Indeed, Dr. Hocker explained at trial what he meant by his reference to her death occurring "*around 6:00 a.m.*", as follows:

> Estimating about a 60 percent degree of rigor mortis and at 1:00 p.m., allowed me to state that probably the death had occurred *around 6:00 a.m.*

> There is a variable in this case. Individual bodies have a varying degree of which they develop rigor mortis, the temperature of the room. *And so, contrary to any fictional accounts of placing time of death, you cannot be that specific. And so when we say approximately, we allow a time, in this case, of two hours either side of that time.*

(R. 929) (emphasis added).

9. Petitioner exaggerates the time Evans-Smith told investigators that he sat down to have breakfast with his wife. (Petition, p. 6). Investigator Jeff Brown testified that upon Merchant's and his first visit with Evans-Smith at his office the afternoon of the murder, Respondent told them he sat down for breakfast with his wife at approximately 6:00 a.m. (R. 579). At the April 17, 1985, interrogation at which both Brown and Merchant were present, Brown testified Evans-Smith said he sat down to breakfast with his wife at 5:45 a.m. (R. 588-589),

and Merchant said Evans-Smith told them, "About 5:30, maybe 20 of 6:00 ... *or 20 of 6:00, yes, at that point.*" (R. 680). Clearly the earliest time attributable to a statement by Evans-Smith from this testimony is that he may have *sat down for breakfast* as early as 5:40 a.m. Furthermore, regardless of what time he sat down with his wife, the testimony is consistent that Mrs. Evans-Smith remained at the kitchen table with the newspaper when he went upstairs to shower and dress for work.

10. In arguing that Evans-Smith was late to work within a time range of 15 minutes to one hour, Petitioner relies upon the testimony of Dorothy Lohman as the only witness to address Respondent's "usual" arrival time as "between 7:30 and 8:00 a.m." (Petition, p. 6). Petitioner

also raises this issue in other portions of his argument (Petition, pp. 12, 24, and 27-28) to support the premise that Evans-Smith was at the residence when his wife was killed. The relevance of the possibility versus proof of his presence beyond a reasonable doubt is well addressed by the Fourth Circuit Court of Appeals, (Petition, pp. 11A, 12A, 12A n.11, and 29A).

In fact, Dorothy Lohman testified at trial only that she "liked to get to the office a little early and [she] would usually get there between 7:30 and 8:00 o'clock in the morning." (R. 814). She testified that "[v]ery often [Respondent's] would be the first car there and sometimes mine would be the second. So

he was often in at the same time." (Id.)[9] However, Lohman did not testify whether or not she noticed his car in the parking lot the morning of April 15, 1985, when she arrived, and she did not state the time of her arrival that morning.[10]

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[9]The characterization as "often" or even "very often" does not mean that this was *always* or even "usually" the case.

[10]This same witness testified that she did not see the Respondent in his office at 8:45 a.m. She further testified that when she met with him around 11:00 a.m. that morning to edit a book, she observed that: "I thought that day his mood was rather pleasant and I thought that was a little bit unusual for that time period." (R. 821). The Commonwealth urged upon the jury that this created an inference of guilty conduct, that somehow the Respondent would have been in an unusually pleasant mood *some five hours after killing his wife in a sudden heat of passion*, as opposed to having had a lovely Easter weekend with her at the farm and the Oatlands' point-to-point races.

11. Petitioner persists in asserting without basis that there was evidence to support an unclear theory advanced by the Commonwealth at trial that the Respondent killed his wife in the kitchen and then dragged her upstairs, or knocked her out in the kitchen and then strangled her upstairs. (Petition, pp. 7-9 and 24-25). Petitioner argues the following evidence would support an inference (as opposed to a "reasonable" inference) that an unknown[11] intruder could not have initially attacked Mrs. Evans-Smith at the kitchen table, rendered her unconscious, and dragged her up to her second story bedroom where the final strangula-

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[11]Petitioner again uses inverse logic, urging that all the Commonwealth need prove is that the killer was known to the victim and, therefore, could only have been the Respondent.

tion occurred. Petitioner states the evidence supporting this theory is the *slight* displacement of the kitchen table and hutch behind it from their usual locations,[12] *fantasized drag marks* on the kitchen floor caused by the victim's heels,[13] the table *laid on its side as opposed to having been knocked over* at the foot of the stairs, and the medical

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[12]One would think that if the attack began at the kitchen table, the table would be more than slightly askew. Moreover, there is the unexplained circumstance of the front door being found ajar when Ms. Cook arrived at the farm at 11:00 a.m. (R. 1165).

[13]The Court accurately discusses the state of the evidence on the "drag" marks as actually "scratch" marks on the linoleum floor. In fact Special Agent Ritchie testified that: "They were more like scratch marks, parallel scratch marks in the linoleum." (R. 393). There is nothing in the record that would support an inference, let alone a "reasonable" inference that these marks were caused by the victim's heels or slippers.

examiner's testimony that the injury to the back of the victim's head *could* have been caused by bouncing against wooden stairs. The Fourth Circuit Court of Appeals addressed the obvious factual problems with this assertion in great detail. (Petition, p. 20A n.18).

12. Petitioner argues that certain aspects of Respondent's conduct and statements indicated a guilty conscience. Of particular note, the petition argues that Respondent evidenced no tears or shock upon the news of his wife's murder. (Petition, pp. 8 and 28). Clearly the testimony of both sheriff investigators, Brown and Merchant, indicated evidence of both shock and emotion, including (1) respondent's rapid questioning of them about what had happened after they told him of his wife's murder (R. 973-975),

(2) his statement of "oh, my god, the van" when Brown mentioned that it appeared a burglary had occurred (R. 976), (3) Respondent's actions in his car, observed by Brown when Respondent stopped at traffic lights while driving home in front of the officers' vehicle after having been told of her murder, regardless of the officer's impression of them (R. 979), and (4) his repetition of his daughter's name upon first seeing her after finding out about the murder indicated shock and grief (R. 1173). As the Court observed, the Petitioner's suppositions of Respondent's behavior "are derived from acts of his consistent with a husband's perfectly proper behavior mixed with the imaginations of behavior for which his presence has not been proven." (Petition, p. 29A).

## REASONS FOR DENYING THE WRIT

### I. THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS CREATED NO NEW RULE.

In this case, the United States Fourth Circuit Court of Appeals acknowledged, restated, and affirmed each and every relevant principle of law which governs the consideration of a claim under Jackson v. Virginia, 443 U.S. 307 (1979) in federal habeas corpus proceedings. Petitioner's meritless complaint is that the Court departed from established precedent to the point of making a new rule, by applying the "beyond a reasonable doubt" standard to its consideration of "basic facts" and "preliminary inferences," rather than to the evidence as a whole.

Petitioner cites four instances in which the Court allegedly "acknowledged that it was requiring *basic facts and*

*preliminary inferences from the basic facts* to be proven individually beyond a reasonable doubt." (Petition. pp. 11-12) (emphasis added). Regardless of these characterizations, it is clear from the Court's decision that the conclusion urged by Petitioner cannot be divined, given the Court's clear and unequivocal statements to the contrary. Moreover, in connection with each instance as to which Petitioner complains, he has not identified the facts that are "basic" versus "ultimate," nor which inferences to be drawn from those facts are "primary" (Petition p.23), "preliminary" (Petition p.25), "intermediate" (Petition p.25), or essential to a finding of guilt.[14] Con-

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[14]It is unclear upon how many levels of inferences Petitioner's case depends, but it is obviously several. Thus, the Fourth Circuit Court of Appeals was actually generous to Petitioner when it noted

sequently, the characterization of any particular evidence as basic facts and preliminary inferences is a fiction when the singular objective of Petitioner is to identify Respondent as the murderer.[15]

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that "[o]nce again, what is required here, in order to find for the Commonwealth, is a kind of *double* inference." (Emphasis added). (Petition, p. 25A n.25).

[15]Concerning the particular query as to the manner in which the victim was killed, and, thus, whether Colonel Evans-Smith could have accomplished the acts attributed to him by the prosecution, the Fourth Circuit Court of Appeals noted that each of the Commonwealth's theories would have required Evans-Smith, "a 64-year-old man in admittedly good shape," to carry or drag his wife's "heavy" body upstairs by her ankles "without doing any further damage to her body or any damage to the house." Mrs. Evans-Smith had only "a defined internal contusion" on the back of her head, which is plainly inconsistent with the Commonwealth's theory that she was dragged by her ankles up 13 steps. (Petition, p. 20A n.8). The Court correctly noted that there was no evidence in the record that could have supported such a conclusion. (Petition, p. 20A n.8).

The unavoidable fact is that the Fourth Circuit Court of Appeals stated unequivocally and repeatedly that the requisite legal analysis is just as Petitioner himself states it to be.

> The standard of review for a claim of insufficient evidence is whether, viewing the evidence in the light most favorable to the prosecution, Goldsmith v. Witkowski, 981 F.2d 697, 701 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 3020 (1993), and according the benefit of all reasonable inference to the government, United States v. Tresvant, 677 F.2d 1018, 1921 (4th Cir. 1982), any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

(Petition, p. 17A). The Court also noted:

> [t]he question before us in the instant case, therefore, is whether the wholly circumstantial evidence, *taken together*, could allow any rational trier of fact to conclude *beyond a reasonable doubt* that Evans-Smith murdered his wife. In conducting such an inquiry *we consider all the evidence presented in the record.*

(Petition, p. 18A)(second emphasis in original). After its description and analysis of the evidence, the Court iterated:

> At the outset, it is worth noting that circumstantial evidence need not exclude every reasonable hypothesis of innocence. Stamper v. Muncie, 944 F.2d 170, 174 (4th Cir. 1991). Rather, "circumstances altogether inconclusive if separately considered, may, by their number and joint operation...be sufficient to constitute conclusive proof." Id. (internal quotation marks and citations omitted).

(Petition, p. 27A).

Thus, the "rule" of the case is in no sense "new." In light of these plain and unimaginative restatements of the law, including all the consideration to which the Commonwealth is entitled, it is difficult to take seriously Petitioner's prediction of a jurisprudential maelstrom arising from this decision that will engulf not only the fragile world of

federal habeas corpus, but the criminal justice system generally. (Petition, pp. 28-29).

Petitioner simply ignores each of the clear and correct statements of law set forth above in the Fourth Circuit Court of Appeals' opinion. He also ignores the Court's actual discussion of the evidence by focusing entirely on isolated references to the "beyond a reasonable doubt" standard, primarily in one footnote.[16] Contrary to Peti-

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[16]It is difficult to believe that certiorari is actually available to review a lower court's comment in a footnote that "more witnesses stated that he had arrived at the normal time than stated that he had been late, thus corroborating Evans-Smith's own statements." (Petition, p. 22 n.8, 12A n.11). Petitioner of course ignores both the real import of that footnote and the real evidence. As the Court noted, the *only* witness who testified that Colonel Evans-Smith arrived at work late "based her conclusion on her *not* having seen him *in his office*." (First emphasis in original). Testimony that a

tioner's assertions, it is readily apparent from the Court's actual analysis of the evidence that it did, in fact, apply the correct principles of law with which it began and ended that analysis.

Petitioner's attempt to draw an analogy to Justice Scalia's hypothetical in Schad v. Arizona, 111 S.Ct. 2491, 2506 (1991) plainly fails. (Petition pp. 19-20). The hypothetical postulated by

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social science research program director was not physically within the confines of his own office at a particular moment is hardly persuasive or even remotely significant evidence that he was "late for work." Thus, the Court actually gave the Commonwealth's case more credit than it deserved when it engaged in what Petitioner characterizes derisively as the "cruel expedient of counting heads among witnesses." (Petition, p. 22 n. 8.) The simple fact is that, on its side of the ledger, the Commonwealth had no witnesses whose testimony, *when considered as a whole*, could establish that Evans-Smith arrived at work late.

Justice Scalia in Schad,[17] demonstrates only that, consistent with prior opinions of the Court, it is unnecessary for a jury to demonstrate unanimity as to the "requisite *actus reus*." The hypothetical was, by its own terms, based on the fact that the defendant *could have* accomplished the killing by alternative means and that, thus, resolution of the factual dilemma was irrelevant to either the

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[17]Schad presented the question of whether the Due Process Clause requires a sentence of death to be set aside where it is impossible to determine from the verdict upon which theory of the defendant's mental state the jury relied in sentencing the defendant to death and whether it was unanimous as to any one theory. This Court found that no constitutional violation had occurred. However, it is of significance that there was no claim in Schad that one of the alternative grounds was either legally or factually defective. Furthermore, all nine Justices recognized the existence of limits on the principle that the jury need not be unanimous as to the theory of guilt.

identity of the killer or any other element of the offense.[18]

There is not a comparable issue raised in this petition. Here, the Fourth Circuit Court of Appeals' discussion of the evidence related to the ability of Evans-Smith to accomplish the murder in the manner suggested by the Commonwealth. If he could not have done so, then he could not be the perpetrator, just as, if he was not there at the time of the crime, he could not be the perpetrator. Thus, the failure of the Commonwealth to prove beyond a reasonable doubt that Respondent could have accomplished the murder in the manner suggested by it

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[18]Resolution of the factual dilemma in Justice Scalia's hypothetical would not be academic, under any of the opinions in Schad, including his own, if, for example, a killing accomplished by arson constituted a capital offense while a killing by strangulation did not.

(or that he was there when the murder was committed) is equivalent to the "ultimate fact" of the killer's identity.[19] The Fourth Circuit Court of Appeals' analysis, therefore, is not flawed.

In the final analysis, Petitioner's argument is predicated on ignoring the Fourth Circuit Court of Appeals' acknowledgment of all relevant legal principles, a fact obviously recognized by all of the judges of the Court when they denied Petitioner's request for rehearing *en banc*.

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[19]Petitioner's dramatic attempt to characterize the Fourth Circuit Court of Appeals decision in its "crystal bud vase" analogy (Petition, p. 20 n.5) under some formulation of the Schad decision reflects how unreasonable Petitioner's criticisms of the Court's decision are. The real point is that there was no such evidence linking the Respondent to the victim, which was the cause for the Fourth Circuit Court of Appeals conclusions reached in its decision.

As Justice Kennedy observed in his concurrence in Wright v. West, 112 S.Ct. 2482, 2499 (1992):

> By its very terms [Jackson] provides a general standard which calls for some examination of the facts. The standard is whether any rational trier of fact could have found guilt beyond a reasonable doubt after a review of all the evidence, so of course there will be variations from case to case. Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.

Clearly no new rule of law was created by the Fourth Circuit Court of Appeals in this case, despite the imaginative lawyering evidenced by the petition.[20]

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[20]The Fourth Circuit Court of Appeals has consistently applied the rule of Jackson in numerous post-conviction cases in addition to those cited in its decision in this case. See, e.g., Sneed v. Smith, 670 F.2d 1348, 1352 (4th Cir. 1982)(affirming denial of the writ); Epperly v.

**II. CERTIORARI IS NOT AVAILABLE TO REVIEW THE FACT INTENSIVE ANALYSIS PERFORMED BY THE FOURTH CIRCUIT COURT OF APPEALS, WHICH INVOLVED NO "EXTENSION" OF EXISTING PRECEDENT.**

Petitioner's argument that the United States Fourth Circuit Court of Appeal's opinion is an unauthorized extension of the Jackson v. Virginia "reasonable doubt standard" is equally as specious as his "new rule" argument. It is in fact Petitioner, not the Fourth Circuit Court of Appeals, who has "disregarded the significance of the evidence as a whole." (Petition, p. 23). The Court simply refused to consider snippets of evidence in isolation, unrelated to the remainder of the Commonwealth's own evidence and unrelated to the entire testimony of any given witness, and re-

Booker, 997 F.2d 1, 6-9 (4th Cir.) *cert. denied*, 126 L.Ed.2d 575, 114 S.Ct. 611 (1993).

fused to make the leaps of logic urged by Petitioner's view of the evidence. (Petition, p. 23A n.22). This fact is elemental in the Court's ultimate ruling that:

> ...the evidence assessed in its entirety and in the light most favorable to the prosecution is not sufficient to persuade any rational trier of fact of the petitioner's guilt beyond a reasonable doubt, that Evans-Smith's conviction on the evidence therefore violated his constitutional right to due process, and that he is entitled to the relief sought in this habeas corpus proceeding. Evans-Smith could no doubt have acted as the prosecution has contended he did. However, the suppositions are derived from acts of his consistent with a husband's perfectly proper behavior mixed with imaginations of behavior for which his presence has not been proven. *To start with the assumption that the crime was committed and then to show that each piece of circumstantial evidence can be explained in a consistent manner is fundamentally different from examining each piece of evidence and finally concluding beyond a reasonable doubt that the defendant was guilty. The prosecution has attempted to accomplish only the first alternative, not the*

> *second. As the Supreme Court has long taught "it is the duty of the Government to establish . . . guilt beyond a reasonable doubt."* In Re Winship, 397 U.S. 358, 362, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) (quoting Leland v. Oregon, 343 U.S. 790, 802-803, 96 L. Ed. 1302, 72 S. Ct. 1002 (Frankfurter, J., dissenting)). Such guilt has not been established, and, as a consequence, Evans-Smith's right to due process has been violated.

(Petition, p. 29A)(emphasis added).

Petitioner complains that the Court's application of Jackson, "gives virtually no 'play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' Jackson, 443 U.S. at 319." (Petition, pp. 21-22). What Petitioner persists on ignoring is that the Court applied this exact evaluation and specifically addressed what conflicts existed

and what "reasonable" inferences could be drawn from the evidence in this case by any jury.

1. Petitioner argues that Dr. Hocker's testimony established that 6:00 a.m. "was the *most likely time* of death." (Petition, p. 23)(emphasis added). Even Petitioner acknowledges, however, in its rendition of the facts, that Dr. Hocker did not so testify. The best Petitioner can argue is that such a conclusion is "*implicit* in the doctor's testimony." (Id.)(emphasis added). However, Dr. Hocker's testimony is devoid of any such implication. As mentioned earlier in this Brief in Opposition, Hocker stated in relevant part:

> There is a variable in this case. Individual bodies have a varying degree of which they develop rigor mortis, the temperature of the room. *And so, contrary to any fictional accounts of placing time of*

> *death, you cannot be that specific. And so when we say approximately, we allow a time, in this case, of two hours either side of that time.*

(R. 929) (emphasis added).

Consequently, there is no evidence in this case that provides any basis for an inference, let alone a "reasonable" inference, to be drawn that Mrs. Evans-Smith's time of death was at 6:00 a.m. or more likely than not at 6:00 a.m.

As the Fourth Circuit Court of Appeals correctly noted, according to the forensic evidence Mrs. Evans-Smith could have been killed as late as 8:00 a.m. The medical examiner who performed the autopsy established that she died within thirty to sixty minutes after she ate. The only evidence as to when she may have eaten came from Evans-Smith himself, who reportedly told investigators that he sat down with her sometime between 5:40

a.m.[21] and 6:00 a.m. and that he left for work between 6:20 and 6:25 a.m. The evidence also revealed a window of up to an hour and a half between when he said he left for work and her murder. (Petition, pp. 26A-27A, ns. 27 and 28). As the Court noted, "We must not re-weigh the evidence, but it is worth illustration that the victim could easily have been killed after Evans-Smith left." (Id. n.28).

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[21]Petitioner states that the time range during which Respondent ate breakfast with his wife was actually between 5:30 a.m. and 6:00 a.m., which conclusion was adopted by the trial court in the judge's letter opinion rendition of the facts. (Petition, p. 35A). The testimony of the investigators, however, reveals inconsistencies in their testimony relating to the same conversation with Evans-Smith, which at best establishes that he told them during a joint interrogation that he had breakfast at 5:40 (Merchant R. 679-680) or 5:45 a.m. (Brown R. 588).

2. Petitioner next asserts that Evans-Smith's time of arrival at work "was important in the proof of his guilt...," which the Court disregarded. (Petition, p. 24). Petitioner relies upon the testimony of Ms. Lohman as the proof of his lateness. As discussed previously, the only evidence presented by Ms. Lohman was that she did not see him *in his office* at 8:45 a.m. on April 15, 1985. She did not testify as to when she arrived at work that day or whether when she did arrive if she noticed that his car was not in the parking lot. At best, her testimony established that the Respondent was often at work around the same time she normally arrived (an unspecified time between 7:30 a.m. and 8:00 a.m.), which she described as "early". Another prosecution witness and co-worker

of the Respondent, James Rudolph, testified without contradiction that the office was on a flex time, and that the established time of arrival for employees was between 8:00 a.m. and 8:30 a.m. (R. 987). The fact that Ms. Lohman did not see the Respondent in his office at 8:45 a.m. that morning is a far cry from evidence that he was not *at work* earlier than that, even between 7:30 a.m. to 8:00 a.m., the time she described as that by which he "often" arrived.

In essence Petitioner is arguing that the jury was free to resolve the evidence against Evans-Smith by speculating from this incredibly thin evidence that he was late to work because he was otherwise criminally occupied earlier that morning. Not only was there no evidence to justify this inference, there

was no evidence to justify the "basic" fact that he had arrived at work late. This, as the Fourth Circuit Court of Appeals ruled, is not the basis for a finding of Respondent's guilt beyond a reasonable doubt. *See*, People v. Contes, 457 N.Y.S.2d 45, 46 (A.D. 1982), *aff'd*, 467 N.Y.S.2d 349 (Ct. App. 1983) (the State's obligation to prove guilt beyond a reasonable doubt "necessarily includes the obligation to prove beyond a reasonable doubt that the defendant was at the criminal scene at the time, which, in turn means proof - express or implied - beyond a reasonable doubt that the defendant was not somewhere else.")

3. Petitioner asserts that the Fourth Circuit Court of Appeals "evidently disregarded" evidence that scratches on Evans-Smith's arm "*could have been*

caused by human fingernails such as the victim." (emphasis added). The probable reason for the Fourth Circuit Court of Appeals position on this issue is that there was no forensic evidence that the victim actually scratched anyone other than herself. It is Petitioner's position that this elemental fact be ignored and that a jury be allowed to infer from only the scratches found upon the Respondent, that he had been scratched by the victim. To complicate matters further, Petitioner's position requires the jury to choose among conflicting testimony of the prosecution's expert witnesses as to whether in fact the scratches found on the Respondent could have been caused by fingernails, let alone fingernails like the victim's. Although one medical examiner stated that the scratches could have

been caused by human fingernails such as the victim's, two other medical experts put on by the Commonwealth testified to the contrary. Thus Petitioner's real complaint with the manner in which the Fourth Circuit Court of Appeals evaluated this evidence is that the Court did not accept Petitioner's assertion of a jury's "right" to engage in abject speculation on this issue. Neither Winship nor Jackson nor their progeny require the selective approach to the evidence that Petitioner proposes. Guilt beyond a reasonable doubt cannot be founded on such slender reeds.

4. Petitioner argues next that the Fourth Circuit Court of Appeals disregarded the evidence that the unconscious victim had been dragged from the kitchen up the stairs to the bedroom and the

resulting inference that the attack began at the kitchen table. (Petition, pp. 24-25). Here, contrary to the rhetoric of his arguments in the petition, Petitioner in fact urges that the Supreme Court actually create a new rule that the federal courts **not** consider the totality of the prosecution's own evidence.

No evidence established that either the victim's feet or her slippers could have made the marks on the kitchen floor.[22] Moreover, Petitioner has no explanation for the gravity defying notion that the victim could have been dragged up thirteen steps by her feet and

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[22]Petitioner has persisted in arguing that the scrape marks found on the kitchen floor originated from the victim's slippers or her bare feet. (Petition, pp. 7-8). Considering the direct testimony to the contrary concerning the victim's slippers, it is *impossible* to create a "reasonable" inference that they were caused instead by the victim's bare heels.

not suffered any further injuries to her head, body, and clothing (as there was with the button from her robe in the bedroom). In short, the Petitioner simply ignores these gaping holes in its theory of the crime.

5. Petitioner asserts that "the jury could have inferred...that the crime was unplanned and thus had been committed in a sudden heat of passion." (Petition, p. 25). The problem again is that such inferences must be reasonable in light of the evidence of the case. In fact, there was no evidence on this issue to give rise to such an inference. Petitioner surmises that the Fourth Circuit Court of Appeals "evidently concluded that this intermediate inference had not been proven beyond a reasonable doubt, from the Court's finding that "[n]o evidence of

... heat of passion was introduced at trial." (Petition, p. 18A). (Id.) However, there is not the slightest suggestion that the Court applied the reasonable doubt standard to this imaginary "intermediate inference." The Court merely recited the fact that not only was there no such evidence, but the evidence indicated the contrary.[23]

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[23]As much of this Brief in Opposition demonstrates, Petitioner's arguments in this case require that neither the absence of evidence nor evidence to the contrary be allowed to interfere with a jury's right to unbounded speculation. Petitioner finds no problem with a jury concluding here that the "crime had been committed in a sudden heat of passion" based on the "hasty and poorly-conceived way in which the scene had been staged." (Petition, p. 25). In fact, the inference which Petitioner urges as "reasonable" would be entirely speculative even in the absence of the evidence that Respondent and his wife were observed enjoying each other's company the day before her murder.

6. Finally, Petitioner makes much of what he characterizes as "conduct bespeaking a consciousness of guilt." (Petition, p. 26). As the Fourth Circuit Court of Appeals correctly noted, such evidence is of little probative value in the absence of evidence linking Evans-Smith to the crime. (Petition, p. 24A n. 23). Furthermore, the Court quite properly noted that the vast majority of the evidence upon which Petitioner relies as evidence of guilty conscience is no such thing. (Id.) Petitioner's interpretation of that evidence involves nothing more than fantasizing guilty interpretations for thoroughly innocent conduct. Indeed, as the Court aptly noted, had Evans-Smith acted differently than he did, the prosecution "would no doubt have instanced the scenario as proof of mur-

der." (Petition, p. 13A n.12). The fact is that the Commonwealth would have found evidence of guilty conscience in whatever reactions Evans-Smith had or in whatever he had done. There was nothing unique or peculiar about the conduct of which the Petitioner complains, or about the questions he asked of the police, and certainly nothing which suggested atypical conduct by a former Special Forces' Colonel such as Evans-Smith.[24]

In its closing words, the Fourth Circuit Court of Appeals fairly summarized the fallacy of Petitioner's claims:

> ... Evans-Smith could no doubt have acted as the prosecution has contended he did. However, the suppositions are derived from acts of his

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[24]Evans-Smith had a physical encounter with two sheriff deputies at his farm gate after an extended wait there to go up to the residence to see his wife's body the night of the murder. (Petition, pp. 13A and 24A).

> consistent with a husband's perfectly proper behavior mixed with imaginations of behavior for which his presence has not been proven.

(Petition, p. 29A).

The Court's ultimate conclusion that the evidence in the case against Respondent was insufficient to prove his guilt beyond a reasonable doubt is entirely consistent with existing case law and in no sense represents a departure from the well settled principles of Winship and Jackson. On the other hand, the result urged by Petitioner would represent a substantial diminution of the government's obligation to prove a defendant's guilt to a "virtual state of near certitude." Jackson, 443 U.S. at 315. It would allow the government to substitute wholesale speculation for evidence as proof of a defendant's guilt. *See, e.g.*, United States v. Menesses, 962 F.2d 420,

426-27 (5th Cir. 1992) (reversing a conviction that was "based on inference upon inference"); Cosby v. Jones, 682 F.2d 1373 (11th Cir. 1982). As the United States Eleventh Circuit Court of Appeals observed in Cosby:

> ...[Jackson] does not mean that whenever the record supports conflicting inferences, no matter how weak, the prosecution wins.... If Jackson's beyond a reasonable doubt standard is to have any meaning, we must assume that when the choice between guilt and innocence ... reaches a certain degree of conjecture and speculation, then the defendant must be acquitted."

Id., 1383 & n.21.

What Petitioner argues is not the law now, and it should not be seriously considered by this Court.

## CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this

Court deny the issuance of the Writ of Certiorari requested by Petitioner.

Respectfully submitted,

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October, 1994 TERM

WILLIAM EVANS-SMITH
vs.
COMMONWEALTH OF VIRGINIA

No. 0079-86

COURT OF APPEALS OF VIRGINIA

361 S.E.2d 436, 5 Va. App. 188

October 20, 1987, Decided

Circuit Court of Loudoun County, Carleton Penn, Judge.

HEADNOTE

(1) Evidence -- Rulings on the Admission of Evidence -- Standard. -- The admissibility of evidence is a matter of law to be determined by the trial judge; evidence is admissible if it is both relevant and material.

(2) Evidence -- Relevance -- Standard. -- Evidence is relevant if it tends to establish the proposition for which it is offered; evidence is material if it relates to a matter properly at issue.

(3) Evidence -- Rulings on the Admission of Evidence -- Prejudice. -- Relevant evidence should be excluded if the prejudicial effect of the evidence outweighs its probative value; the fact that some prejudice may result does not justify automatic exclusion.

(4) Evidence -- Hearsay -- Standard. -- Hearsay is testimony which consists of a narration by one person of matters told him by another; the strongest justification for the exclusion of hearsay is that the trier of fact has no opportunity to view the witness on cross-examination and to observe the demeanor of the out-of-court declarant to determine reliability.

(5) Evidence -- Hearsay -- Defined. -- If a declaration is offered solely to show that it was uttered, without regard to the truth or falsity of its content, the declaration is not excluded by the hearsay rule, hearsay also is admissible if it falls into one of the recognized exceptions to the hearsay rule which are based on necessity and inherent trustworthiness.

(6) Evidence -- Hearsay -- State-of-Mind. -- The state-of-mind exception is one of the recognized exceptions to the hearsay rule; if the declarant's state of mind is relevant to the case, then admissions of the declarant's mental state are admissible, providing they refer to a presently existing state of mind and there is no obvious indication of falsification or contrivance.

(7) Evidence -- Materiality -- Standard. -- Matters which have no logical bearing upon the case are said to be immaterial and evidence tending to prove an immaterial matter is not admissible.

(8) Evidence -- Hearsay -- Admission. -- Remoteness is a factor to be weighed in determining the indicia of reliability to be accorded hearsay statements and in balancing the probative value of a statement against its prejudicial effect.

(9) Evidence -- Hearsay -- Res Gestae. -- The declarations of a person before his death, which are so connected with the act as to form a part of the same transaction, and which illustrate and explain the homicide, are admissible as part of the res gestae, but declarations or statements not constituting a part of the res gestae, and not made in the presence of the accused, are not competent evidence.

(10) Jury Trial -- Juror Misconduct -- Standard. -- Generally, the testimony of jurors ought not to be received to impeach their verdict, especially on the ground of their own misconduct; the rationale for this rule is to avoid jury tampering, to discourage jurymen from changing their minds, to emphasize the importance and solemnity of the jurors' role, and to ensure the finality of verdicts.

(11) Jury Trial -- Juror Misconduct -- Standard. -- An exception to the general rule limiting post-verdict examination of jurors is recognized when it appears that matters not in evidence may have come to the attention of one or more jurors so as to violate the defendant's right to be confronted with the witnesses against him.

(12) Jury Trial -- Juror Misconduct -- Standard. -- In considering a motion to set aside when juror misconduct is alleged, the trial court has the duty to investigate the charges and to ascertain whether or not, as a matter of fact, the jury was guilty of such misconduct; the trial court may properly summon one or more jurors to testify under oath in open court and to answer relevant questions propounded by the court and counsel about what has transpired.

(13) Jury Trial -- Juror Misconduct -- Standard. -- A motion for a new trial based on juror misconduct cannot be sustained on the juror affidavit alone; however such affidavits may provide sufficient cause to require the trial court to investigate the matters recited in the document.

(14) Jury Trial -- Juror Misconduct -- Standard. -- A juror may not properly receive any information about a case he is hearing except in open court and in the manner provided by law; however, the reception of such evidence is harmless error and will not be considered as grounds for setting aside the verdict unless there is sufficient reason to believe that an accused has been prejudiced by receipt of the information.

(15) Jury Trial -- Juror Misconduct -- Standard. -- The test in a criminal case is not whether the jurors were actually prejudiced by the extraneous matter, but whether they might have been so prejudiced; if they might have been

prejudiced, then the purity of the verdict is open to serious doubt and the verdict should be set aside and a new trial awarded.

(16) Jury Trial -- Juror Misconduct -- Standard. -- The principle is well settled that a juror may not impeach a verdict solely upon his mental processes.

SYLLABUS

Defendant was convicted of second degree murder. He argued that the trial court erred in admitting hearsay testimony pursuant to the state-of-mind exception, erred in failing to set aside the verdict because evidence not admitted at trial was considered by the jury, erred in failing to set aside the verdict because of prejudicial and inaccurate closing argument by the prosecution, erred in failing to provide information to the defense disclosed to the court by the prosecution pursuant to his discovery motion, and that the evidence was insufficient to support the conviction.

The Court of Appeals reversed and remanded, holding that the trial court erred in admitting certain statements made by the victim and another prosecution witness. The Court also held that the trial court erred in failing to summon and examine the jurors to determine whether they were influenced by their consideration of extraneous information.

COUNSEL

Blair D. Howard, David H. Moyes (Howard & Howard; Moyes & Maggs, on briefs), for appellant.

Frank S. Ferguson, Assistant Attorney General (Mary Sue Terry, Attorney General, on brief), for appellee.

JUDGES

Koontz, C.J. Duff, J., and Hodges, J., concurred.

AUTHOR: KOONTZ

OPINION

{*191} William Evans-Smith (appellant) was convicted in a jury trial of second degree murder in violation of Code Sec. 18.2-32 and sentenced in accordance with the jury's recommendation to five years incarceration. On appeal, he argues that: (1) the trial court erred in admitting testimony pursuant to the state-of-mind exception to the hearsay rule; (2) the trial court erred in failing to set aside the verdict due to extraneous evidence not admitted at trial

which the jury considered in its deliberations; (3) the evidence was insufficient as a matter of law to support the conviction; (4) the trial court erred in failing to set aside the verdict due to prejudicial and inaccurate statements made by the Commonwealth's attorney during closing argument; and (5) the trial court erred in failing to provide defense counsel information which the Commonwealth's attorney provided the court pursuant to a pretrial discovery order for exculpatory evidence.

I. Facts

On April 15, 1985, between 4:00 and 8:00 a.m., appellant's wife, Barbara Evans-Smith, was murdered at the couple's rural home. Although the exact time of death was not established, the medical examiner concluded that Mrs. Evans-Smith

died thirty to sixty minutes after she had eaten breakfast.

{*192} Between 10:30 and 11:00 a.m., on April 15, Lesleigh Evans-Smith Cook arrived at her parents' home. Finding the outer doors unlocked, parts of the house in disarray, and receiving no response upon calling to her mother, Cook became alarmed and, using a CB car radio, summoned two friends. When they arrived, they discovered Mrs. Evans-Smith's semi-nude body in her upstairs bedroom. Her night clothes were ripped, giving the appearance of sexual assault. Her bedroom and appellant's bedroom had been ransacked, giving the appearance of a robbery. Downstairs, a hall table was overturned and some kitchen furniture had been moved. The rest of the house was undisturbed.

Mr. Evans-Smith was notified of his wife's death between 3:00 and 4:00 p.m. at his Washington office. He maintained then and at trial that his wife was alive when he left for work that morning shortly before 6:30 a.m.

Mr. Evans-Smith testified that he arose that day a few minutes before 5:00 a.m. as was his custom. He shaved, dressed in "barn clothes," and drove his car down the lane to get the newspaper. He testified that he drove with his headlights on because it was dark. On that morning, he testified that the beam of his headlights momentarily shone on a dark colored van that was parked on the opposite side of the road facing him. When he returned to the house, he parked the car in the garage and did his stable chores. He then returned to the house,

ate breakfast with his wife and read the paper. Afterwards, he showered and dressed for work. Evans-Smith testified that his wife waved good-bye to him from her bedroom window as he left for work. He testified that no verbal or physical confrontation occurred between them on April 15. He further testified that he arrived at his office after dropping off some books at about 8:10 a.m., and that he worked there until the police arrived at 3:45 p.m. to inform him of his wife's death.

II. The Hearsay Issue[1]

At trial, the thrust of the Commonwealth's case was that the Evans-Smiths' marriage was deteriorating



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[1]For clarity, the germane facts are recounted in relation to the issue to which they pertain.

and unhappy. The Commonwealth attempted to show that in the year prior to Mrs. Evans-Smith's death, Mr. Evans-Smith had become increasingly {*193} hostile and depressed over troubles at his work, the unhappy ending of a long standing extramarital affair in August 1984, and his dissatisfaction with his marriage. These feelings of frustration and despair allegedly culminated in the murder of Barbara Evans-Smith. The Commonwealth attempted to show through the testimony of several witnesses that the victim was aware of the change in her husband's personality and that she was fearful of his increasingly volatile and hostile nature. The purported relevance of this evidence was that it would tend to prove motive and intent. Among the voluminous evidence presented was the testimony of

Duane Dean, Mary Pitz and Lesleigh Cook. In ruling on the admissibility of the evidence proffered by Dean, Pitz and Cook, the court stated that no testimony as to appellant's behavior or the victim's state of mind would be allowed prior to August 1984 due to the remoteness of the events. The court reasoned that the period after August 1984 was a crucial time as it was when William Evans-Smith's extramarital affair ended and his lover moved to California.

Duane Dean was voir dired and testified that she had known the Evans-Smiths for five years and that subsequent to August 1984, Barbara Evans-Smith told her outside of William Evans-Smith's presence that he "was getting... much testier." Dean stated that Mrs. Evans-Smith "was concerned,

very concerned and she felt that Bill [Evans-Smith] was becoming much more violent," and that on April 2, 1985, the victim told her that he was "often in a very bad mood [and there] was not the cooperation between them that there had been before."

Mary Pitz was voir dired and testified that she had been good friends with Barbara Evans-Smith for fifteen years. She stated that subsequent to August 1984, Mrs. Evans-Smith told her outside of William Evans-Smith's presence that he "was becoming more violent and easily upset." She also stated that on March 23, 1985, she and her husband were dining at the Evans-Smiths' when Mrs. Evans-Smith realized the oven was not on and she said, "Oh my God, the oven isn't on, and Bill will be angry...." She

proceeded to heat a casserole on top of the stove because, "Bill is going to be furious" and "I don't want any problem." Pitz also recalled an incident during December 1984 when the Evans-Smiths were leaving the Pitzes' house. Pitz stated that Mr. Evans-Smith yelled to his wife, who was talking with Mrs. Pitz at the {*194} front door, "Dammit, Barbara, come on or I'll push you in the pond...." Mrs. Evans-Smith said to Pitz: "You know, I think he would." On cross-examination Pitz acknowledged that they were standing "half a block" from the pond at the time of this exchange.

As to Pitz's testimony, the court ruled:

> The court is of the view that she may relate the kitchen incident to be shown personally to the decedent's state of mind. The court makes the same ruling respecting the

incident on the steps... the party during Christmas of 84.

The court concluded that all of the foregoing testimony was admissible pursuant to the state-of-mind exception to the hearsay rule. See C. Friend, The Law of Evidence in Virginia Sec. 238 (2d ed. 1983).

Both Dean and Pitz specifically acknowledged that they had never seen William Evans-Smith strike his wife and both testified that Mrs. Evans-Smith had never indicated to them that her husband had ever struck her.

Lesleigh Evans-Smith Cook was also called as a Commonwealth's witness to establish her mother's state of mind concerning Barbara Evans-Smith's fear of appellant. Cook was voir dired in the judge's chambers and during that examination stated that her father's

personality had changed "somewhat" since August 1984 and that her mother had noticed this change and discussed it with her outside of her father's presence. Cook stated that one day during the 1984 Christmas season, she telephoned her mother who seemed "very distressed," but would not discuss the problem on the telephone. When Cook arrived at her parents' house, her mother had been crying and told Cook, "Your father tried to kill me last night." However, Barbara Evans-Smith refused to discuss any of the specifics with her daughter. Cook also stated that her mother refused to discuss the basis of her opinion or conclusions on these matters.

Defense counsel argued to the court that the victim's statements to Cook, especially, "Your father tried to kill me

last night," were inadmissible because they were merely conclusions for which there was no factual basis which could be gleaned from the evidence. {*195} Furthermore, counsel argued that the statements were inadmissible because of their highly prejudicial and potentially devastating effect on Evans-Smith's defense. Counsel also contended that the statements were inadmissible because they were not made in Evans-Smith's presence and were not part of the res gestae. The Commonwealth's attorney argued that the testimony was admissible to show that the victim was fearful of her husband. He argued that Mrs. Evans-Smith had related only facts, not conclusions.

In ruling on Cook's proffered testimony, the trial court stated:

> I don't know how to cure the problem the court has with the statement of ["]your father tried to kill me last night["] because I think that is an opinion and as such is not admissible. However, I do think that the witness should be permitted to testify concerning the state of mind of her mother on that occasion. I think it should be linked to the conduct of the father without reference to the attempt to kill. It shows the state of mind of [Barbara Evans-Smith].[2]

The court further ruled that Cook's testimony would be allowed to show the victim's state of mind and not for the truth of the matter asserted and the court so instructed the jury.



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[2]We note that the record of the judge's rulings refers to hearsay evidence being admitted as probative of the "decedent's" state of mind in some places and the "defendant's" state of mind in other places. However, the evidence was offered at trial for the purpose of showing Barbara Evans-Smith's state of mind and that is the issue the parties have briefed and argued on appeal. Accordingly, we shall not consider whether the hearsay was admissible as probative of appellant's state of mind. Rule 5A:18.

In open court, Cook testified that since August 1984 she had noticed that her father "was more easily angered" and stated that during the holiday season of 1984:

> I had telephoned my mother... and realized that she was upset so I went to the farm and she had been crying and I asked her what was wrong and at that time she related to me an incident between my mother and father that caused her to be fearful of my father.... She tried very hard to control her emotions but she was not able to... she was quite distraught and very hysterical.

{*196} Cook also stated that her mother told her sometime between Thanksgiving 1984 and New Year's 1985 that Evans-Smith struck her, but Cook could not recall the details of that conversation. She stated that her mother told her more than once during this period that she had experienced trouble sleeping because she was "afraid."

In this appeal, the Commonwealth argues that the hearsay testimony was admissible for two reasons: (1) to refute the position taken by the defense during opening statement and throughout the trial that the Evans-Smiths' marriage was harmonious; and (2) to establish that the victim was fearful of appellant. The Commonwealth argues that this evidence was probative of motive and intent and therefore admissible under the state-of-mind exception to the rule against hearsay. We disagree.

Initially, we note that opening statements are not evidence and therefore we reject the Commonwealth's argument that hearsay evidence allegedly probative of the victim's state of mind was admissible to rebut appellant's representations during opening statement.

See Fields v. Commonwealth, 2 Va. App. 300, 307, 343 S.E.2d 379, 382-83 (1986). While we recognize that the Commonwealth was entitled to present evidence of the Evans-Smiths' relationship, we conclude that on the facts of this case and for the reasons stated below, the evidence at issue was not admissible.

(1-3) The admissibility of evidence is a matter of law to be determined by the trial judge. Gottlieb v. Commonwealth, 126 Va. 807, 812, 101 S.E. 872, 874 (1920). Evidence is admissible if it is both relevant and material. "[E]vidence is relevant if it tends to establish the proposition for which it is offered." C. Friend, supra, Sec. 134. Evidence is material if it relates to a matter properly at issue. Id. However, relevant evidence should be excluded if

the prejudicial effect of the evidence outweighs its probative value. Id; see also Shepard v. United States, 290 U.S. 96, 104 (1933); Cumbee v. Commonwealth, 219 Va. 1132, 1138, 254 S.E.2d 112, 116 (1979); Edwards v. Syrkes, 211 Va. 600, 601, 179 S.E.2d 902, 903 (1971); Levine v. City of Lynchburg, 156 Va. 1007, 1014, 159 S.E. 95, 98 (1931). The fact that some prejudice may result does not justify automatic exclusion, however. C. Friend, supra, Sec. 136.

> {*197} [T]he court is not applying an absolute standard but is in fact always balancing the probative value of the evidence against the disadvantages (delay, confusion, prejudice, surprise, etc.) which may attend its admission. Each decision is made in light of the individual circumstances of the case, and the same evidence might well be admitted in one case and excluded in another because the balance struck between the factors is different in the two instances.

Id. at Sec. 135 (emphasis omitted).

(4-5) Hearsay is "testimony which consists [of] a narration by one person of matters told him by another." Williams v. Morris, 200 Va. 413, 417, 105 S.E.2d 829, 832 (1958). The strongest justification for the exclusion of hearsay evidence is that the trier of fact has no opportunity to view the witness on cross-examination and to observe the demeanor of the out-of-court declarant to determine reliability. C. Friend, supra, Sec. 224. However, "[i]f the declaration is offered solely to show that it was uttered, without regard to the truth or falsity of its content, the declaration is not excluded by the hearsay rule." Speller v. Commonwealth, 2 Va. App. 437, 446, 345 S.E.2d 542, 548 (1986) (citations omitted) (emphasis omitted). In addition, hearsay evidence

is admissible if it falls into one of the recognized exceptions to the hearsay rule which are based on necessity and inherent trustworthiness. C. Friend, supra, Sec. 230 et seq.

(6) The "state-of-mind" exception is one of these recognized exceptions. If the declarant's state of mind is relevant to the case, then admissions of the declarant's mental state are admissible, providing that they "refer to a presently existing state of mind" and there is "no obvious indication of falsification or contrivance." C. Friend, supra, Sec. 238; accord Karnes v. Commonwealth, 125 Va. 758, 764, 99 S.E. 562, 564 (1919); Johnson v. Commonwealth, 2 Va. App. 598, 602, 347 S.E.2d 163, 165 (1986).

For our analysis, we have categorized the testimony as follows: (a)

the victim's statements to Pitz, Dean and Cook concerning appellant's personality and the Evans-Smiths' relationship; (b) Cook's personal observations concerning appellant's personality and the Evans-Smiths' relationship; and (c) the kitchen and pond incidents related by Pitz.

{*198} a. The Victim's Statements to Dean, Pitz and Cook

(7) We first turn to the victim's statements to Dean, Pitz and Cook that appellant was becoming testier and more violent. We agree with appellant that the trial court erred in admitting these statements under the state-of-mind exception. We reach this result because we find the proposition for which they were offered was immaterial. Evidence is not admissible unless it is material to

the issues in the case. "Matters which have no logical bearing upon the case are said to be immaterial, and evidence tending to prove an immaterial matter is not admissible." C. Friend, supra, Sec. 134. For these statements to have been admissible, the victim's state of mind, in itself, must have been probative of an ultimate issue in this case. C. Friend, supra, Sec. 238. Here it was not. Whether Mrs. Evans-Smith feared her husband was probative of neither his motive or intent nor of the ultimate issue in the case, namely, whether William Evans-Smith murdered Barbara Evans-Smith. Certainly, had the appellant possessed motive or intent, either would have existed independent of the victim's fear of him or any other state of mind.

A victim's state of mind would be relevant in cases where the defense contends that the death was the result of suicide, accident or self-defense. In those cases, hearsay statements made by the victim illustrating his or her state of mind would be relevant, material and admissible. See Compton v. Commonwealth, 219 Va. 716, 729, 250 S.E.2d 749, 757 (1979)(evidence of prior relations existing between accused and victim relevant to issue of whether death was accidental); Parsons v. Commonwealth, 138 Va. 764, 781, 121 S.E. 68, 73 (1924) (statement of accused on the day of the murder that he was afraid of the victim relevant to material issue of self defense); Scruggs v. Commonwealth, 125 Va. 736, 743-44, 99 S.E. 518, 520 (1919) (evidence of victim's state of mind

relevant to material issue of whether death was result of suicide). Here, however, the defense did not contend that Mrs. Evans-Smith's death was the result of suicide, accident or self-defense. Therefore, these statements were immaterial and inadmissible.

Even if we were to hold that Barbara Evans-Smith's fear of her husband was material, we find that this evidence was not probative of fear, and therefore not relevant. The victim's statements {*199} that her husband was becoming testier and more violent may have indicated a strained and disagreeable relationship, but they did not tend to prove her fear of him. In fact, Mrs. Evans-Smith never told Pitz, Dean or Cook that she was afraid of her husband.

(8) Finally, these statements were conclusions with no factual support in the record which would tend to substantiate or corroborate them. The rationale for allowing hearsay, the inherent reliability of the statement, was absent here. Further, without more detail or examples it was impossible for appellant to rebut this evidence. We also find it significant that all of Mrs. Evans-Smith's statements to Cook, Dean and Pitz concerning the purported personality changes in her husband were made outside of appellant's presence. Clearly, appellant's defense was prejudiced by being faced with the near impossible task of rebutting opinions and conclusory statements made outside of his presence by an unavailable witness who could not be cross-examined. Furthermore,

the statements were made between August 1984 and New Year's 1985, some four to eight months before the victim's death. Remoteness is a factor to be weighed in determining the indicia of reliability to be accorded hearsay statements and in balancing the probative value of a statement against its prejudicial effect. See generally Jones v. Commonwealth, 202 Va. 236, 117 S.E.2d 67 (1960); Belton v. Commonwealth, 200 Va. 5, 104 S.E.2d 1 (1958). In excluding the victim's statement to Cook that, "Your father tried to kill me last night," the trial court correctly ruled that this constituted an inadmissible opinion. We believe the victim's other statements to her daughter and her friends were likewise inadmissible opinions.

For similar reasons, we hold that these statements were also inadmissible to rebut appellant's portrayal of the marriage as a happy one, as the Commonwealth argues. The statements were remote in time to the victim's death; they were hearsay and they were made outside of appellant's presence. Further, we do not believe that the statements were probative of appellant's view of the marriage. In summary, we believe their prejudicial effect outweighed any probative value.

Since these statements were not admissible pursuant to an exception to the hearsay rule and since the victim's fear was not a material issue, we find that these statements were offered for no other purpose than to show appellant's increasingly violent nature. {*200}

Although the jury was instructed that the testimony was to be considered only to illustrate Barbara Evans-Smith's state of mind, it is impossible to discern for what purpose the remarks were received by the jury.

In Shepard, the prosecution offered the hearsay statement by the victim, "Mr. Shepard has poisoned me," as a dying declaration at trial and it was admitted into evidence. The United States Supreme Court reversed and held the statement inadmissible as either a dying declaration or a state-of-mind exception to the hearsay rule. The Court's rationale was that the statement exceeded the bounds of proving the victim's state of mind and invaded the jury's province

of determining the ultimate issue.

Justice Cardozo stated:

> [The Government] did not use the declarations by Mrs. Shepard to prove her present thoughts and feelings, or even her thoughts and feelings in times past. [The Government] used the declarations as proof of an act committed by [the victim's husband].... This... the Government was free to prove, but not by hearsay declarations. It will not do to say that the jury might accept the declarations for any light that they cast upon [the victim's state of mind] and reject them to the extent that they charged the death to someone else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed.... When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.

290 U.S. at 104 (citations omitted).

Because it is impossible to tell to what extent the jury was influenced by this prejudicial evidence, we hold that the

admission of these statements constituted reversible error.

(9) Our conclusion is supported by several Virginia cases dealing with statements of the victim in homicide cases. In Mullins v. Commonwealth, 113 Va. 787, 75 S.E. 193 (1912), the Supreme Court held as follows:

> The declarations of a person before his death, which are so connected with the act as to form a part of the same transaction, {*201} and which illustrate and explain the homicide, are admissible as part of the res gestae, but declarations or statements not constituting a part of the res gestae, and not made in the presence of the accused, are not competent evidence.

Id. at 789, 75 S.E. at 195.

Likewise in Belton, the trial court committed reversible error in admitting into evidence statements made by the victim two months prior to her murder and outside of the defendant's presence. A

witness in Belton testified that the victim stated as follows:

> [s]omeone was trying to break into her apartment at night; that on one occasion she had been awakened and found the accused standing over her bed; that she was afraid of the accused and had reported to the town authorities that he was going around town armed with a gun.

200 Va. at 7, 104 S.E.2d at 3.

Finally in Jones, the Supreme Court held that admission of the victim's statement made more than one month before her death and outside of the defendant's presence that she thought that the accused would kill her was prejudicial and reversible error. 202 Va. at 242, 117 S.E.2d at 72. The Commonwealth attempts to distinguish these cases by pointing out that the foregoing statements were not admitted pursuant to an exception to the hearsay rule. However, we are unpersuaded by this argument as we have

concluded that Mrs. Evans-Smith's state of mind was immaterial and, therefore, that the state-of-mind exception was inapplicable. Accordingly, we find that the victim's statements were inadmissible to prove the appellant's intent. C. Friend, supra, Sec. 238.

Additionally, the statements were also inadmissible to prove motive. In Scruggs, to establish the motive for the murder the Commonwealth introduced a statement made by the victim that the defendant owed her money. The Supreme Court found the admission of this evidence to be reversible error, stating: "[M]otive can no more be proved by hearsay evidence than any other fact." 125 Va. at 746, 99 S.E. at 521.

{*202} b. Cook's Personal Observations

We now address Cook's personal observations concerning appellant's personality and the Evans-Smiths' relationship. Cook testified that between August 1984 and the time of trial in August 1985 that she had noticed that her father "was more easily angered." She also described her mother as being "distraught," "hysterical," "depressed," and "fearful" during the 1984 holiday season. At the outset we note that Cook's personal observations of her mother are not hearsay. Lay witnesses may testify to "changes in physical conditions observed from time to time by the witness." C. Friend, supra, Sec. 210. Lay witnesses may opine that a person is "ill," "suffering," or "nervous." Id. (footnotes omitted). In our view, however, the prejudicial effect of this evidence

outweighed its probative value and the evidence should have been excluded. While this evidence may have been probative of Barbara Evans-Smith's state of mind, the fact that her state of mind was not material, together with the potentially detrimental effect of this evidence on appellant's case, compelled its exclusion. First, these observations occurred four to seven months prior to the murder and were, thus, remote in time. Although the evidence tended to explain the Evans-Smiths' relationship, it was not necessarily probative of fear, and thus, its probative value was far outweighed by its prejudicial nature. See Cumbee, 219 Va. at 1138, 254 S.E.2d at 116. Further-more, because Barbara Evans-Smith's state of mind was not itself a material issue, this evidence

served only to mislead the jury and to arouse their hostility towards appellant.

c. The Pond and Kitchen Incidents

Finally, we address the pond and kitchen incidents as related by Pitz. We believe that this testimony also should have been excluded. First, the victim's state of mind was not a material issue. Even if state of mind were an issue, we believe it was impossible for the jury to have followed the court's instructions to receive the testimony only as it related to the victim's state of mind. Because we cannot say to what extent the jury was influenced by this testimony, we hold that its admission was reversible error. Furthermore, even if the victim's fear had been a material issue, this evidence should have been excluded due to its inflammatory nature and the fact that

these incidents were not probative of the victim's fearful state of mind. To the contrary, there is such a wide range {*203} of inferences that flow from these incidents that we believe it was reversible error to have admitted them as evidence of the victim's state of mind. The pond incident occurred in December 1984, four months before the victim's death. It was just as likely that Evans-Smith was joking, impatient or mildly irritated as it was evidence of a violent nature which would have made his wife fearful. Likewise, her response was susceptible to many interpretations other than fear, such as sarcasm, amusement or even indifference. Furthermore, he was "half a block" from the pond at the time of the exchange and never attempted to act on his remark. Similarly, the kitchen

incident does not tend to show the victim's fear of her husband. It was just as likely probative of the everyday tensions of married life or concern with being a proper host and hostess. It is impossible to determine the context in which these remarks were made and any connection between these remarks and the victim's state of mind was tenuous at best. We believe that the admission of statements such as these is a dangerous policy and on the facts of this case, was error.

Furthermore, we believe that the admission of all of the foregoing evidence cannot be deemed harmless because the circumstantial evidence of appellant's guilt aside from this evidence was "not so overwhelming as to establish the guilt of the accused beyond

a reasonable doubt." Harryman v. Estelle, 616 F.2d 870, 876 (8th Cir.), cert. denied, 449 U.S. 860 (1980).

III. Juror Misconduct Issue

At trial, the defense contended that Mrs. Evans-Smith was killed by intruders during a rape-robbery attempt. To this end, appellant testified that he had seen a suspicious looking dark colored van parked 300 to 400 feet away on the road in front of his driveway when he retrieved the newspaper shortly after 5:00 a.m. on April 15. He noticed the van because the beam from his headlights was reflected by it. A witness, Tracy Dillon, testified that about 8:30 a.m. on April 15, a green van with Louisiana license plates pulled out in front of her on a road near the Evans-Smiths' house. She reported the incident to the police

because the van pulled out very abruptly and would not let her pass. In addition, defense counsel also presented evidence that tire tracks were seen in a hay field 200 to 300 feet away from the victim's house. Evidence was also introduced that two horsetrainers from a commercial {*204} race track in West Virginia were working at a neighboring farm on the morning of the murder. The defense attempted to implicate these men as Mrs. Evans-Smith's assailants.

Four days after the jury rendered its verdict, juror Christine Nelson disclosed to defense counsel that another juror had consulted an almanac outside of the jury room and had discussed his findings inside the jury room during jury deliberations. According to Nelson, the juror checked the time of sunrise on

April 15, 1985, to determine whether appellant was telling the truth. The almanac revealed that the sun had already risen at the time appellant testified he turned on his headlights. Nelson stated that she had voted "not guilty" in the two votes that were taken during the first four days of deliberation, but after she evaluated this information (which she alleged was discussed in the jury room on the fifth day of deliberations) and, after the other jurors told her that if sentenced to five years Evans-Smith would serve only one, Nelson changed her vote to "guilty."

Defense counsel made a post trial motion to set aside the verdict based on juror misconduct. The trial court initially refused defense counsel's offer

of juror Nelson's testimony and her affidavit, stating:

> [T]his Court I think must base its decision on your motion with what it deems to be the law of the Supreme Court of Virginia. Your motion to have this affidavit received in evidence and to put this juror on the witness stand is denied.

However, the court allowed defense counsel to vouch the record with her testimony and affidavit. Additionally, the Common-wealth's attorney cross-examined Nelson.

Upon a motion to reconsider, the court reversed itself and received Nelson's affidavit (but not her

testimony)[3] as well as seven {*205} identical affidavits from other members of the jury offered by the Commonwealth. These affidavits essentially rebutted Nelson's. The affidavits conceded that



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[3]Appellant states on brief: "Although the trial judge in the Evans-Smith case did reconsider and receive testimony on the question of extraneous information, he made no determination as to whether this evidence was prejudicial or even whether it might have prejudiced the defendant under the Brittle 'test.' The trial judge simply reasoned that it was improper to impeach a juror's vote." Our examination of the record shows this to be an incorrect account. The trial court initially refused to consider Nelson's affidavit or testimony, but allowed defense counsel to proffer them to the court. Later, the court received Nelson's affidavit, but not her testimony. The court then decided to receive the other seven affidavits, but refused to hear the testimony of any jurors. Thus, the court never actually considered testimony of any of the jurors. Even though Christine Nelson's testimony appears in the record, it was simply a proffer. For this reason we have addressed this issue as follows: (1) whether the trial court erred in failing to summon and examine the jurors; and (2) whether the trial court erred in failing to set aside the verdict.

the jury had discussed the almanac information, but each of the seven jurors stated he or she was not influenced by the information. They further stated that the jury vote was eleven to one in favor of guilt both before and after the almanac information was revealed and that a unanimous vote of guilty was not reached until the fifth day of deliberations after the jury had been given the Allen charge. These jurors stated that the almanac discussion occurred on the fourth day of deliberations and not on the fifth as Nelson alleged and they also denied that the verdict was a "quotient" verdict. The trial court refused to recall the jurors and question them in open court. In denying the motion to set aside the verdict, the trial court judge reviewed

the applicable case law and quoted Bull v. Commonwealth, 55 Va. (14 Gratt.) 613, 633 (1857) as follows:

> The verdict is surely the best evidence of [a juror's] opinion of the case; and he at least should not be permitted, as a general rule, to impeach it.... The jury may be polled, and ought to be, if there is the least doubt of the free concurrence of all the jury in the verdict.... Is it not more reasonable that this easy legal precaution should be used, than that affidavits should be obtained of the jurors after their discharge, and made the foundation of a motion for a new trial? Again: the court, if not satisfied with the verdict, may and might set it aside. And if it improperly refuse to do so, the appellate court may revise and reverse the judgment.

On appeal, appellant argues that the trial court erred in failing to set aside the verdict where the jury considered extraneous evidence not presented in open court and where appellant was effectively denied his sixth amendment right to confrontation.

The Commonwealth argues that the jury's consideration of the almanac information was not improper because it was a proper {*206} subject matter for judicial notice and it was correct. The Commonwealth urges us to extend the court's power of judicial notice to the jury. Furthermore, the court was correct in its original decision to refuse affidavits and testimony because, the Commonwealth asserts, such evidence is not admissible to impeach a jury verdict. Presentation of affidavits and testimony is proper only in a case where the alleged taint arose from external forces outside of the jury. Finally, the Commonwealth notes that this matter was within the court's sound discretion and should not now be disturbed because appellant has not shown an abuse of

discretion. For the reasons stated below, we disagree.

(10-12) Generally, "the testimony of jurors ought not to be received to impeach their verdict, especially on the ground of their own misconduct." Bull, 55 Va. (14 Gratt.) at 632; accord Caterpillar Tractor Co. v. Hulvey, 233 Va. 77, 82, 353 S.E.2d 747, 750 (1987); see also Commercial Union Ins. Co. v. Moorefield, 231 Va. 260, 265, 343 S.E.2d 329, 333 (1986). The rationale for this rule is to avoid jury tampering, to discourage jurymen from changing their minds, to emphasize the importance and solemnity of the jurors' role, and to ensure the finality of verdicts. However, there is strong public policy and legal precedent which mandates the interrogation of jurors to determine if

an impropriety has tainted the verdict. "An exception to the general rule limiting post-verdict examination of jurors is recognized when it appears that matters not in evidence may have come to the attention of one or more jurors so as to violate the defendant's constitutional right to be confronted with the witnesses against him." 19 Michie's Jurisprudence Verdict Sec. 34 (Repl. Vol. 1979).

> In considering a motion to set aside when juror misconduct is alleged, the trial court has the affirmative duty "to investigate the charges and to ascertain whether or not, as a matter of fact, the jury was guilty of such misconduct." Kearns v. Hall, 197 Va. 736, 743, 91 S.E.2d 648, 653 (1956). The trial court may properly summon one or more jurors to testify under oath in open court and to answer relevant questions propounded by the court and counsel about what had transpired. Dozier v. Morrisette, 198 Va. 37, 40, 92 S.E.2d 366, 368 (1956). This is an exception to the general rule that testimony of jurors is inadmissible to impeach their verdict. Id., 92 S.E.2d at

> 368. Ordinarily, jurors will not be allowed "to {*207} explain their verdict by stating the reasons upon which their conclusions are based." Federal Deposit Insurance Corp. v. Mapp, 184 Va. 970, 983, 37 S.E.2d 23, 28 (1946).

Commercial Union Ins. Co., 231 Va. at 265, 343 S.E.2d at 333 (emphasis added); see also Haddad v. Commonwealth, 229 Va. 325, 330, 329 S.E.2d 17, 20 (1985).

Historically, courts have been more willing to examine allegations of juror misconduct which originate in sources outside of the jury. A juror who himself alleges the misconduct of a jury on which he has served is subject to particular scrutiny and is treated with great caution. See, e.g., Bull, 55 Va. (14 Gratt.) at 632-33.

(13) A motion for a new trial based on juror misconduct cannot be sustained

on juror affidavits alone. However, such affidavits may provide "sufficient [cause] to require the trial court to investigate the matters recited in the document." Commercial Union Ins. Co., 231 Va. at 265, 343 S.E.2d at 333 (citations omitted); see also Kearns v. Hall, 197 Va. at 741-42, 91 S.E.2d at 652. Accordingly, when the information disclosed in the jurors' affidavits indicates that injustice probably occurred, the trial court has an affirmative duty to further investigate whether juror misconduct occurred. Commercial Union Ins. Co., 231 Va. at 265, 343 S.E.2d at 333.

(14-15) As we have recognized, "[a] juror may not properly receive any information about a case he is hearing except in open court and in the manner

provided by law." Brittle v. Commonwealth, 222 Va. 518, 522, 281 S.E.2d 889, 890 (1981)(citing Crockett v. Commonwealth, 187 Va. 687, 706, 47 S.E.2d 377, 386 (1948)); accord Hinton v. Gallagher, 190 Va. 421, 432, 57 S.E.2d 131, 136 (1950). However, the reception of such evidence, aliunde, is harmless error and will not be considered as grounds for setting aside the verdict unless "there is sufficient ground to believe that... an accused... has been prejudiced by receipt of the information." Brittle, 222 Va. at 522, 281 S.E.2d at 890 (citations omitted); accord Crockett, 187 Va. at 705-06, 47 S.E.2d at 386.

> The test in a criminal case is not whether the jurors were actually prejudiced by the extraneous matter, but whether they might have been so prejudiced. If they might have been prejudiced, then the purity of the

> verdict is open to serious doubt and the verdict should be set aside and a new trial {*208} awarded.

Thompson v. Commonwealth, 193 Va. 704, 715, 70 S.E.2d 284, 290 (1952) (citations omitted); accord Brittle, 222 Va. at 522, 281 S.E.2d at 890. Furthermore, "only slight evidence of influence or prejudice...should be required to warrant the granting of a new trial." Crockett, 187 Va. at 705, 47 S.E.2d at 386 (citations omitted).

Against this background, we turn to the present facts to determine whether the trial court erred in denying appellant's motion to set aside the verdict. Initially, we hold that it was improper for a juror to have consulted an almanac outside of the jury room to determine the time of sunrise on April 15 and to have discussed this matter in the

jury room during deliberations. "It is always improper for a juror... to receive any information about [a cause] except in open court and in the manner provided by the law...." Crockett, 187 Va. at 706, 47 S.E.2d at 386 (citations omitted). We are not persuaded by the Commonwealth's contention that the almanac information was a proper subject matter for the jury's consideration simply because an almanac report of sunrise is a proper subject matter for judicial notice. Virginia courts have not extended this privilege to the jury and we decline to take this opportunity to do so. See C. Friend, supra, Sec. 287. We further note that the time of sunrise contained in an almanac is not the equivalent of common sense, knowledge, and experience upon which a juror may rely. Id. We also

decline to accept the Commonwealth's contention that the almanac information was not offensive because it was true. It is simply impossible to determine the truth of such information absent its being received as evidence in open court and subject to cross examination.

We also must determine whether the trial court erred in refusing to summon and examine the jurors to determine whether misconduct occurred, and if so, the effect of that misconduct. Preliminarily, we note that we support the judicial policy of treating with particular wariness and scrutiny a dissident juror who comes forth to identify juror misconduct. We believe, however, that this case merited further inquiry by the trial court because the misconduct alleged by Nelson was

corroborated by seven of the eleven other jurors. The trial court concluded after evaluating all eight affidavits and applicable case law that Christine Nelson's affidavit and {*209} the seven other affidavits were insufficient "to serve as the basis for the granting of a new trial in this case." The court's rationale was that Nelson's affidavit did not state a sufficient claim of jury misconduct which would allow her to impeach the verdict. The court determined that her affidavit "states a conclusion only... but states no specific fact such as the hour of sunrise in a given geographical location.... Most importantly, the affidavit of Nelson contains a recitation of mental processes concerning how she reached that verdict."

(16) The principle is well settled that a juror may not impeach a verdict solely upon his mental processes. See Downey v. Peyton, 451 F.2d 236, 239 (4th Cir. 1971); Washington Luna Park Co. v. Goodrich, 110 Va. 692, 698, 66 S.E. 977, 979 (1910) (citations omitted); Bull, 55 Va. (14 Gratt.) at 632; 19 Michie's Jurisprudence Verdict Sec. 34 (Repl. Vol. 1979). Here, however, the alleged misconduct was not the jurors' mental processes, but the evidence, aliunde, which may have influenced their mental processes. When there is a probability that such external evidence has influenced the jury, the court has "the affirmative duty 'to investigate the charges and to ascertain whether... as a matter of fact, the jury was guilty of such misconduct.'" Commercial Union Ins.

Co., 231 Va. at 265, 343 S.E.2d at 333 (quoting Kearns v. Hall, 197 Va. at 743, 91 S.E.2d at 653). Accordingly, we hold that the affidavits proffered to the court and made a part of the record warranted further investigation by the court.

In this regard, we hold that the trial court erred as a matter of law in concluding that no further investigation concerning the almanac information was warranted. Implicit in the court's decision that the affidavits were insufficient "to serve as the basis for the granting of a new trial in this case," was the conclusion that no probability of prejudice arose from the almanac information. The trial court also noted: "[N]o almanac will tell you whether it was daylight at a given hour.

It only gives sunrise.... Knowing when the sun rises under the facts of this case, it being very early in the morning, the hour of sunrise is not conclusive of whether it was daylight or dark." We disagree.

We conclude that the probability of prejudice to the appellant flowing from the jury's consideration of the almanac information was great because the purpose for which the evidence, aliunde, was considered went to an ultimate issue in the case. The juror {*210} consulted the almanac to determine whether appellant was lying about seeing a mysterious van parked near his home on the morning of his wife's murder. Evans-Smith's entire defense rested on the theory that his wife was murdered during a rape and robbery attempt by intruders in a van.

Whether the jury believed Evans-Smith's testimony that a van was parked just outside his driveway was paramount in determining the ultimate issue of guilt or innocence in this circumstantial evidence case. The very essence of Evans-Smith's case was his credibility and veracity. For this reason we believe that it was absolutely essential that appellant be given an opportunity to confront and cross-examine this evidence against him.

We also find the circumstances surrounding the jury's deliberations and the jurors' affidavits strongly indicative of probable misconduct and prejudice which would warrant further investigation. The jury began its deliberations on Monday, August 26, 1985. They deliberated on Monday afternoon,

August 26, all of Tuesday, August 27, Wednesday, August 28, and Thursday, August 29. The almanac information was allegedly considered on Wednesday or Thursday. On Friday morning, August 30, the day the long Labor Day weekend began, the foreman informed the court that the jury was deadlocked. The court then delivered the Allen charge to the jury and urged them to reach a verdict. At 4:40 p.m., the jury returned with a verdict of guilty. As to the jurors' affidavits, we note that four jurors expressed no opinion by way of affidavit as to the almanac information. Clearly, the testimony of these four jurors, as well as the remaining eight, was necessary to determine whether the jurors might have been prejudiced.

Therefore, we conclude that the trial court erred as a matter of law in failing to summon and receive testimony from all of the jurors in order to determine whether the jurors might have been influenced by the consideration of the extraneous almanac information. Accordingly, we need not reach the question whether the trial court erred in failing to set aside the verdict. Further, since we are remanding this case for retrial, it is not necessary that we remand this case to the trial court for further inquiry into the jurors' potential prejudice.

{*211} IV. Other issues

Appellant also argues that the trial court erred in failing to set aside the verdict due to prejudicial and inaccurate statements made by the Commonwealth's

attorney during closing argument and that the trial court erred in failing to provide defense counsel with certain allegedly exculpatory evidence supplied to the court by the Commonwealth's attorney. Appellant further argues that the evidence was insufficient to support the conviction. However, since we reverse and remand for a new trial based on the hearsay and juror misconduct issues, and since we do not know whether these issues will arise upon retrial, and if so, in what factual context, we find that it is not necessary to decide these issues at this time and we decline to do so.

In summary, we conclude that the trial court erred in admitting certain statements made by the victim pursuant to the state-of-mind exception to the hearsay rule, and we find that the court

erred in admitting certain observations made by Lesleigh Cook. We further find that the trial court erred in failing to summon and examine the jurors to determine whether they may have been influenced by their consideration of the extraneous almanac information. For these reasons, the conviction is reversed and the case is remanded for a new trial, if the Commonwealth be so advised.

Reversed and remanded.

(Re: Letter opinion of Judge James H. Chamblin, reflecting court's denial of Respondent's State habeas corpus petition regarding exculpatory evidence)

VIRGINIA:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

| | | |
|---|---|---|
| WILLIAM EVANS-SMITH<br><br>Petitioner | ) | |
| vs. | ) | LAW NO. 13577 |
| JOHN B. TAYLOR, WARDEN<br>STAUNTON CORRECTIONAL CENTER | ) | (Petition for Writ of Habeas Corpus |
| Respondent | ) | |

SUMMARY OF RULING ON PETITION FOR WRIT OF HABEAS CORPUS

As set forth in detail under Findings of Fact and Conclusions of Law, the Amended Petition for Writ of Habeas Corpus is denied and dismissed for the following reasons:

(1) Even if the information given to Investigator Jay Merchant ("Merchant") by Karen Spalding ("Spalding") on the

morning after the murder is considered after- discovered evidence, no relief is available under Fitzgerald vs Bass, 6 Va. App. 38 (1988) because after-discovered evidence does not constitute a basis for habeas relief;

(2) The information given to Merchant by Spalding is clearly exculpatory evidence, but under United States vs. Bagley; 105 S.Ct. 3375 (1985) such evidence is not material; and

(3) The information given by Spalding to Merchant is exculpatory evidence coming under the doctrine of Brady vs. Maryland, 83 S.Ct. 1194 (1963) and its progeny and is not evidence, potentially useful to the defense but lost due to the bad faith of the police, under the doctrine of Arizona vs. Youngblood, 109 S.Ct. 333 (1988).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After a jury trial this Court on August 11, 1989, sentenced the Petitioner William Evans-Smith ("Petitioner" or "Evans-Smith") consistent with the jury verdict to 20 years in the penitentiary on a conviction of second degree murder of his wife, Barbara Evans-Smith ("Barbara"). The Petitioner's petition for direct appeal was denied by the Court of Appeals on June 1, 1990 and by the Supreme Court of Virginia on September 14, 1990.

On May 14, 1992 Evans-Smith filed herein a petition for writ of habeas corpus attacking his conviction on the basis of what he alleges as newly discovered material exculpatory evidence not disclosed to him prior to trial. The evidence concerns statements made to

Investigator Jay Merchant ("Merchant") ofthe Loudoun County Sheriff's Department by Karen Spalding ("Spalding") the morning following the murder about a person she had seen walking on the road near the gate to the Evans-Smith farm where Barbara had been murdered.

As a result of a hearing herein on July 8, 1992 on the Respondent's Motion to Dismiss the original Petition, the Court allowed the Petitioner to amend his petition. He filed an Amended Petition on July 29, 1992, to which the Respondent filed an Answer on September 8, 1992. The Amended Petition alleges that the Spalding statements are both material exculpatory and after-discovered evidence, but if they are not deemed such, then they are potentially useful evidence lost due to the bad faith of

the police under Arizona v. Youngblood, 109 S.Ct. 333 (1988).

On September 21, 1992 this Court set a hearing to determine what information was given to Merchant by Spalding and whether the facts concerning Spalding's report to Merchant were available to Evans-Smith so as to have been included in his prior habeas corpus proceeding. The hearing was held on January 12, 1993.

## I. FINDINGS OF FACT

### A. Spalding Report

As a part of the investigation of the murder, Merchant conducted a "road check" on Route 725 near the Evans-Smith farm early on the morning of Tuesday, April 16, 1985. At the time Merchant knew that Barbara had been murdered in the residence on the farm the previous day (April 15, 1985), and had been told

by Dr. George Hocker, the Loudoun County Medical Examiner, that he estimated her time of death to have been 6:00 to 6:30 A.M. give or take one to two hours. Merchant arrived for the "road check" at about 4:30 A.M. and stayed until about 8:30 A.M.

During the "road check" Merchant stopped every vehicle to determine if anyone saw or heard anything at the time the murder occurred. He stopped a total of 22 vehicles, and he made notes concerning each vehicle he stopped. The notes were made in a spiral bound notebook. He made notes at the time he spoke to the occupants of each vehicle he stopped. He identified the notebook at the hearing, but the notebook itself was not admitted into evidence.

Karen Spalding and her family were living in April 1985 at a house on Route 725 a short distance east of the Evans-Smith farm. The Spalding family was living there temporarily while their fire damaged house near Purcellville was being repaired. Spalding's daughter attended Lincoln Elementary School in Lincoln, Virginia, which is west of the Evans-Smith farm.

The morning of April 16, 1985 Spalding was driving her daughter to school when she was stopped on Route 725 near the Evans-Smith property by Merchant. She was headed west on Route 725 toward Lincoln Elementary School when she was stopped at 7:36 A.M. He asked and obtained from Spalding her name, address and telephone number. He

asked her how often she travelled Route 725 and on what days. She told him that she usually came by about 8:00 A.M. taking her daughter to school. He told her that there had been a murder and asked if she had seen or heard anything. She replied negatively. He gave her his card and asked her to call him if she knew anything. Merchant made contemporaneous notes of his stops of Spalding (Respondent's Exhibit 2).

Spalding worked in McLean, Virginia in April 1985. She proceeded to work after dropping off her daughter at school. She had to be at work by 9:00 A.M. Sometime after the stop, but the same day, Spalding remembered having seen someone walking on Route 725 near the Evans-Smith farm. She called and left a message for Merchant to call her. Later

the same day Merchant returned the call to her.

In the telephone conversation Spalding told Merchant that on the previous Thursday or Friday she saw a person walking on Route 725 toward Lincoln near the Evans-Smith farm at about 8:00 A.M. She told him that it was a white male wearing a jean jacket, jeans and a baseball hat. She said he was in his late 20's or early 30's and had a reddish-brown beard. Merchant told her that someone would get back in touch with her, but no one ever did. Merchant made contemporaneous notes of this conversation (Respondent's Exhibit 4).

Merchant made his notes of both the stop and the telephone conversation in the same notebook. He had notes of all 22 vehicle stops of which Spalding's stop

was the tenth. On the next page of the notebook after the notes of the twenty-second stop are Merchant's notes of his telephone conversation with Spalding.

Although Spalding talked with her husband the evening of April 16., 1985 about these events, she did not discuss them with anyone other than him until May 1992. In November 1991 Spalding went to work for the law firm of David H. Moyes, one of the attorneys who had represented Evans-Smith at trial. In May 1992 during a discussion with a co-worker at the law firm Spalding mentioned the events of April 16, 1985. As a result, this information was provided to present counsel for the Petitioner and led to the filing of this habeas petition.

Spalding does not know Blair D. Howard, the other attorney who

represented the Petitioner at trial, and she does not know the Petitioner.

B. Proceedings Before Trial

Evans-Smith was directly indicted only eight days after the murder. He was released on bond. Because he was indicted directly, Evans-Smith did not have the benefit of a preliminary hearing. He remained free on bond until the jury at his second trial found him guilty on April 27, 1989. The Petitioner has been in custody since that date.

On May 3, 1985 defense counsel filed a discovery motion which included in paragraphs 2 and 3 thereof requests for exculpatory evidence under Brady vs. Maryland, 83 SCt. 1194 (1963)(Petitioner's Exhibit 4).

A hearing was held before Judge Carleton Penn on May 16, 1985 which

concerned the defense discovery motion. From the representations of defense counsel to the Court at the hearing the Commonwealth was clearly aware that the defense knew that the Commonwealth had interviewed over fifty persons; that the defense's investigation indicated that some of those persons has stated things that would not support the Commonwealth's theory of the case; that the defense was aware that the Commonwealth's case was entirely circumstantial; that the defense's theory was that person or persons other than Evans-Smith committed the murder; that the defense saw that the Commonwealth's investigation had narrowly focused only on Evans-Smith; and that the defense needed to follow up on exculpatory evidence right away.

As a result of that hearing the Court ordered the Commonwealth to produce exculpatory evidence, and ordered further that if there was any doubt as to whether or not evidence was exculpatory, then it shall be presented to the Court for in camera inspection. See order entered 23 May 1985, Petitioner's Exhibit 6. It was to be a continuing order. The Court asked the Commonwealth to file its theory of the case confidentially with the Court to be used by it in inspecting any statements in camera.

On May 16, 1985 trial was set to commence on August 13, 1985.

The Commonwealth filed a written discovery response on May 23, 1985 which produced statements of the Petitioner, but not anyone else (Petitioner's

Exhibit 7), and an "Answer to Motion for Exculpatory Evidence" which stated:

> "None known to the Commonwealth at this time."
>
> "Pursuant to Court order all witness statements will be presented to the Court for in camera inspection." (Petitioner's Exhibit 8).

The Petitioner had hired his own private investigators to help him in his defense. The defense acquired information that two individuals has provided the Commonwealth with the reports of suspicious incidents close in time and place to the murder. As a result, a further discovery motion was filed on August 2, 1985 (Petitioner's Exhibit 9).

A hearing was held before Judge Penn on August 5, 1985. He considered it to be an in camera pre-trial conference and excluded the public. Before the hearing

Judge Penn had received from the Commonwealth its theory of the case as well as certain data of the knowledge of witnesses that could arguably be exculpatory. When Mr. Howard raised the issue of the defense's desire to have the Commonwealth produce "any reports regarding suspicious activity of vehicles and persons" (Transcript page 24, Petitioner's Exhibit 10), Judge Penn immediately went into reviewing approximately ten written reports of statements of persons previously supplied by the Commonwealth for in camera inspection. The Court ruled all the reports to be exculpatory and gave them to the defense. At least one of the statements concerned suspicious events that occurred approximately two weeks prior to the murder (the "Gefaell

Statement" - see page 2 of Petitioner's Exhibit 12).

Defense counsel brought up other information that had come to their attention about suspicious activity and its being reported to the Sheriff's Department. Judge Penn suggested that the defense ask for a subpoena duces tecum directed to the Sheriff's Department. The defense followed his suggestion.

On August 8, 1985 a hearing was held before Judge Penn on the petitioner's request for a subpoena duces tecum to the Sheriff's Department for reports of suspicious vehicles and persons from March 15, 1985 to April 20, 1985. At the hearing Judge Penn ordered the production of all memoranda concerning statements made by Tracy Dillon and Elaine Monroe

for in camera inspection and that the subpoena duces tecum be issued in usual form returnable the first day of trial, August 13, 1985.

Evans-Smith's first trial commenced August 13, 1985. On August 30, 1985 the jury found him guilty of second degree murder and fixed his punishment at five years in the penitentiary. He was sentenced, but his conviction was reversed by the Court of Appeals on October 20, 1987. Evans-Smith vs. Commonwealth, 5 Va. App. 188 (1987).

The Commonwealth decided to retry Evans-Smith. On January 11, 1988 the Petitioner filed a discovery motion which included a request for exculpatory evidence under Brady. (Petitioner's Exhibit 14). On January 21, 1988 the

Commonwealth filed a written response stating:

> "The Commonwealth is unaware of any evidence subject to the rules of discovery which was not provided or made known to the defense either prior to during the first trial of this case."

(Petitioner's Exhibit 15).

The Commonwealth filed two supplemental discovery responses (Petitioner's Exhibits 16 and 17) but each concerned only statements of the Petitioner.

This Court granted a suppression motion filed by the Petitioner. The Commonwealth appealed, and the Court of Appeals reversed. After the delay caused by this appeal, the second trial started on April 17, 1989. The jury returned its verdict on April 27, 1989.

At no time did the Commonwealth reveal to the Petitioner or any of his

attorneys the existence of Spalding's statements to Merchant on April 16, 1985. At no time did the Commonwealth produce any memorandum or notes of her statements to the Court for in camera inspection and ruling. Evans-Smith did not learn of Spalding's statements until May 1992.

## II. CONCLUSIONS OF LAW

### A. After Discovered-Evidence Claim

The petitioner argues that he is entitled to habeas relief because the statements and observations of Karen Spalding constitute after-discovered evidence. Assuming that such could be construed as after-discovered evidence under the four-part test recently reiterated in Carter v. Commonwealth, 10 Va. App. 507, 512 (1990), after-discovered evidence does not constitute a basis for habeas relief. Fitzgerald vs. Bass, 6 Va.

App. 38, 46 (1988). Very simply, the purpose of a habeas proceeding is not to determine the petitioner's guilt or innocence but to test the legality of his incarceration.

All relief requested by the petitioner in this proceeding on account of or based upon after-discovered evidence is denied.

B. Material Exculpatory Evidence Claim

In Brady vs. Maryland, 83 S.Ct. 1194 (1963) the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment. Implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.

United States v. Agurs, 2392, 2397 (1976).

Borrowing upon the standard imposed in cases involving incompetence of defense counsel announced in Strickland vs. Washington, 104 S.Ct. 2052 (1984), the United States Supreme Court in United States vs. Bagley, 105 S.Ct. 3375 (1985) held:

> We find the Strickland formulation of the Agurs test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

The Bagley approach has been adopted by the Virginia Supreme Court, Correll vs. Commonwealth, 232 Va. 454 (1987), and

the Virginia Court of Appeals, Carter vs. Commonwealth, 10 Va. App. 507 (1990).

In order for Evans-Smith to be granted habeas relief this Court must find that (1) the Spalding statements to Merchant constitute exculpatory evidence and (2) the exculpatory evidence is material. For the reasons set forth below, this Court finds:

(1) that the information reported by Spalding to Merchant is clearly exculpatory evidence, but

(2) that under the Bagley approach such evidence is not material.

(1) Exculpatory Nature of the Spalding Report

As early as May 16, 1985 (about three months before the first trial) the Commonwealth's Attorney was well aware that Evans-Smith contended that someone else has committed the murder. The

Commonwealth was well aware that the area in which the murder occurred was rural, and, accordingly, it was not an area where one would expect a great amount of vehicular or pedestrian traffic. Hence, any information of an unrecognized or suspicious vehicle or person in the area at a time not too remote from the offense would be exculpatory. Judge Penn recognized this and so ruled when he ordered the "Gefaell Statement" of an event occurring two weeks prior to the murder be produced to the defense.

This Court feels that the evidence of Spalding's statements to Merchant are clearly exculpatory given all the circumstances of this case. Therefore, any argument that the defense did not ask specifically for notes of Merchant's "road check" is of no consequence.

Any argument that the reports are not exculpatory because Spalding said she saw the unknown person on Thursday or Friday before the Monday morning murder and not that morning is not accepted by this Court. A perpetrator could have been observing the farm and its occupants in preparation of committing an offense such as a burglary. He could have been prevented from committing an offense the day he was seen by Spalding only to return Monday morning to commit the murder.

Both the Commonwealth and the defense knew that the evidence against the Petitioner was entirely circumstantial. In such a case the existence of evidence that tends in any way to show that the defendant is not guilty is exculpatory. Evidence that an

unknown male was present near the farm even three or four days before the murder must be deemed exculpatory.

The examination of Merchant's notes by the Questioned Document Branch of the United States Secret Service (Respondent's Exhibit 5) found "no indication to suggest the questioned entry (notes of the telephone conversation with Spalding on April 16, 1985) was falsely dated." As an agent of the Commonwealth, Merchant had written notes of exculpatory information on April 16, 1985. The Commonwealth was certainly aware of the "road check" of Merchant because five witnesses (James Anderberg, Ralph Clark, Mark Simms, Bill Packard and Bart Johnston) testified for the Commonwealth as to the absence of suspicious vehicles Route 725. All five

of these witnesses were stopped by Merchant during the "road check" on April 16, 1985. The Court is aware of this from having examined in camera copies of Merchant's notes tendered to the Court by Mr. McLees at the hearing herein on September 23, 1992. These copies were sealed by the order entered herein on September 23, 1992. The Court sees no need in light of the evidence presented on January 12, 1993 for these copies to remain sealed; and, accordingly, orders them to be unsealed and filed herein.

Merchant is an experienced investigator. At the time of this investigation he had been with the Loudoun County Sheriff's Department since February 1984 having retired after twenty years service with the Fairfax County Police Department. A police officer

with that much experience in criminal investigations should reasonably be expected to have a basic knowledge of the principles of Brady and exculpatory evidence. It goes without saying that, of course, the Commonwealth's Attorney was aware of Brady and its requirements. No explanation was offered as to why Spalding's statements as reported to Merchant one day after the murder were not produced to defense counsel other than the argument, which this Court rejects for reasons set forth above, that the statements are not exculpatory.

This Court cannot turn its back without comment on the response of Merchant when the petition herein was filed and it came to light that Evans-Smith had learned of Spalding's statements. Despite the fact that

Merchant made notes on April 16, 1985 of both the road stop and the telephone conversation (the notes being no more than five pages apart in a relatively small notebook), in his affidavit dated June 1, 1992, Merchant states that he had "no notes or memoranda" of the telephone conversation. Spalding's affidavit filed with the petition says she talked on the phone with Merchant "a day or two" after she was stopped by Merchant. Merchant acknowledges in his affidavit of June 1, 1992 that he read Spalding's affidavit. The notes of the telephone conversation come right after the notes of the last stop on April 16, 1985. Also, in his affidavit Merchant states that his notes from the road check were given to defense counsel before trial pursuant to a discovery order of this Court. There was

absolutely no evidence presented that the notes were given to defense counsel or why Merchant would have made such a statement under oath.

In his second affidavit dated September 21, 1992, and filed with the Answer to the Amended Petition, Merchant states that after reviewing his notebook he found the notes about the telephone conversation. No questions were ever asked of Merchant at the hearing as to why he did not discover the notes of the telephone conversation (located directly after the road check notes) until after making the first affidavit. Merchant stated he made notes in his notebook chronologically. He did not state he made notes in any other place. If he knew Spalding contended she talked to him a day or two after the stop, it seems to

this Court that Merchant would have known exactly where to look without any difficulty for any notes of the telephone conversation. The notes are exactly where one would expect them to be considering when Spalding said in her affidavit that she called Merchant and the method he used to take his investigative notes.

Although it is not relevant or material to this proceeding why the statements were not produced, this Court cannot just merely look away from the circumstances of the nondisclosure when it considers the importance of the Evans-Smith prosecution, the severity of the offense, the defense's theory at trial, the continuing protestation of innocence by Evans-Smith, the rulings of Judge Penn before the first trial as to other

information he deemed exculpatory and the involvement of an experienced prosecutor and investigator. In its first written discovery response the Commonwealth even stated that it would present all witness statements to the Court for in camera inspection, but obviously it did not do so. Considering the pre-trial circumstances of this case, it is very difficult to understand the failure to produce Spalding's statements to the defense.

Spalding's statements in light of all the circumstances of this case are exculpatory.

(2) Materiality of the Spalding Reports

The materiality issue must be addressed from two aspects. First, this Court must consider what defense counsel could have done or would have done differently if

the Spalding statements had been revealed to them. Second, this Court has to consider what the effect would have been on the result of the trial if Spalding's evidence had been presented to the jury.

Mr. Moyes testified at the hearing that if defense counsel had known of Spalding's statements to Merchant, then they would have investigated everyone in the neighborhood and looked for a match to the unknown hairs found at the crime scene. The defense would have conducted further investigation of people near the murder scene and would have pursued further forensic tests. However, the Petitioner gave no specifics of exactly what additional investigation of the neighborhood his private investigators would have pursued. Mr. Moyes testified that Evans-Smith spent close to

$100,000.00 on private investigators, but there was no evidence of exactly what they did in their investigation of people in the neighborhood. There was no evidence of what the investigators did not pursue but would have pursued if they had been aware of Spalding's statements to Merchant.

Spalding lived close to the Evans-Smith farm at the time of the murder yet there was no evidence that the defense had interviewed her or any member of her family before trial. If the defense's theory was someone else perpetrated the crime, then it seems logical to at least ask the occupants of all the nearby homes if they had seen or heard anything. Also, the defense's investigators could have conducted a "road check" similar to the one that Merchant performed.

The defense was well aware (from Evans-Smith's own observations) of suspicious activity on Route 725 at or about the time of the murder. This should have been enough to cause the defense to investigate the presence of suspicious vehicles or persons at that time. The Petitioner has not particularized anything unusual or peculiar to Spalding's statements that would have caused the defense to investigate in a different manner.

Granted that if the defense had known of Spalding's statements, then she could have been interviewed close in time to her observations which would likely result in a clearer recollection and the development of more details. To say that she might have then provided information that could have led to the identity of

the person that she saw is sheer speculation. It is common sense that the observations that would have led to a specific identification of the person are the observations that she would most likely continue to recall to this day. Her recollections as presented at the hearing do not provide anything that would tend to identify the person she saw that morning.

The petitioner argues that if he had been aware that Spalding had seen a person as she said, then his defense could have been pursued additional forensic testing. He did not particularize or specify what testing. Perhaps tests could be done to the hairs found at the scene if the person Spalding saw was found. But it is sheer speculation that the person could have

been found. All forensic tests were available to the defense as to any item found at the crime scene. The Petitioner has failed to show what would have been done differently as to forensic testing if the defense had been aware of Spalding's statements.

This Court would have to speculate as to what other things the defense could have done and what the results would have been if the defense had been advised before trial of Spalding's report. The Petitioner has presented nothing to show that it would have been even probable that having knowledge of Spalding's statements the person could have been located by the defense. Even if the person were located, one would have to again speculate that the person would have provided exculpatory evidence. The

presence of the person on a public road where he had a right to be does not automatically in and of itself implicate him in a nearby murder.

It is certainly reasonable to assume that if the defense had known of Spalding and her report to Merchant, then the defense would have called her as a witness. If she had testified to seeing a person on Route 725, even if on the morning of the Thursday or Friday before the Monday murder, then it would have been admissible at trial. However, this Court cannot find exactly what her testimony would have been or what it would be if she had testified at a prior trial or would testify at another trial if held. For example, she told Merchant in the telephone conversation of April 16, 1985, that the person had a reddish-

brown beard and she stated in her affidavit filed with the petition that the person had blond hair but no beard, but at the hearing she testified that the person had blondish-brown hair and did not mention a beard. Also, in her affidavit she stated that she called Merchant within a day or two of the stop, but at the hearing she testified definitely that she called Merchant the day of the stop. Further, at the hearing she testified to other information about the person which she did not relate to Merchant on April 16, 1985, e.g., the person had his head down and a baseball cap pulled down over his eyes. On September 17, 1992 Spalding gave a statement to the State Police that she had seen the person the "day before, two days before" she was stopped and the

person had blond hair. The Court cannot overlook that Spalding was working for the law firm of one of Evans-Smith's trial attorneys at the time her statements came to light in May 1992.

Even if Spalding testified at trial that the man she saw had blond hair or brownish-blond hair, the Commonwealth could have impeached her by Merchant's testimony of her prior inconsistent statements to him that the man had a reddish-brown beard.

Even though the case against Evans-Smith was entirely circumstantial, there was sufficient circumstantial evidence presented at trial to convict him. There is no need to review that evidence here as this Court reviewed it in detail in its opinion letter of July 21, 1989 when the motion to set aside the verdict for

insufficient evidence was denied. This ruling has been reviewed by the Court of Appeals and the Supreme Court of Virginia, and neither court reversed that decision.

The jury heard evidence of at least two other suspicious incidents and/or persons near in place and time to the murder but found the Petitioner guilty. This Court is of the opinion that even if the jury had received evidence of a suspicious unknown person with blond hair on Route 725 near the Evans-Smith farm on the morning of the murder, the result would have been the same despite the evidence of one blond hair of unknown origin (not forcibly removed, but fallen out) found on the stairway leading to the bedroom where Barbara was found and one hair of unknown origin found near her

hand. There was no evidence of a forced entry. There was no evidence of any outside dirt, mud or moisture being tracked inside the house. The Commonwealth's forensic scientist, Deanna Dabbs, testified at length at the trial about how unknown miscellaneous hairs can be present at a crime scene. This Court is of the opinion that even if the jury had heard Spalding's testimony, there is no reasonable probability that the outcome would have been different.

For the foregoing reasons, this Court finds that even though Spalding's statements to Merchant are exculpatory, the statements are not material because there is no reasonable probability that, had the evidence been disclosed to the defense, the result would have been different. Accordingly, the Petitioner

is denied any habeas relief on the ground of the failure to disclose exculpatory evidence.

C. Claim of Loss of Potentially Useful Evidence Because of Bad Faith of the Police

The Petitioner asserts in his Amended Petition that the statements of Spalding to Merchant should be considered as evidence potentially useful to the defense which was lost due to the bad faith of the police in violation of his due process rights citing Arizona vs. Youngblood, 109 S.Ct. 333 (1988). The Petitioner sets forth in fifteen paragraphs over two and one-half pages allegations of various actions by the Sheriff of Loudoun County and two Sheriff's Department investigators, Merchant and Jeff Brown, Which "reveal a

pattern of bad faith" on the part of the police.

This Court is of the opinion that Youngblood only applies to evidentiary material in the hands of the prosecution that becomes lost or destroyed before the defense could test it, and the test results might have exonerated the accused. Youngblood does not apply to statements or observations of witnesses of which the prosecution may have knowledge because such statements or observations come under the Brady doctrine. Youngblood deals with evidence that never became available to help the defense. Such is not the case here because the Petitioner eventually became aware of the Spalding statements. Brady concerns exculpatory evidence known to the prosecution whereas Youngblood

concerns evidence that if preserved would have been potentially useful to the accused. Youngblood deals with items such as blood samples, clothing or other items of physical evidence which are no longer available for the defense's experts to analyze and test for the defendant's benefit. Even if Merchant's notes are considered evidentiary material under Youngblood, the notes have not been lost or destroyed, and the Petitioner has not articulated how he was prejudiced by not having Merchant's actual notes as opposed to merely not having the information related to Merchant by Spalding.

Youngblood is not applicable to the facts as alleged by the Petitioner or as presented at the hearing. The allegations of bad faith, therefore,

even if true, are immaterial and not relevant to this proceeding. Any relief on the basis of an alleged Youngblood violation is denied to the Petitioner.

Evans-Smith may not have liked how he was treated by the police officers, but nothing has been alleged to show that his rights were violated. He is entitled to a fair trial, not a perfect trial. This Court is of the opinion that he received a fair trial in April 1989. Insensitivity, discourtesy and overzealousness of police officers may be distasteful to Evans-Smith (and they are to this Court, but surely to a lesser extent), but the incidents alleged do not arise to a constitutional deprivation.

Conclusion

For the reasons stated herein, the Amended Petition for Writ of Habeas

Corpus is denied, and it is dismissed. Let Mr. McLees, Assistant Attorney General, prepare an order consistent with these Findings of Fact and Conclusions of Law. Copies hereof have been mailed this day to counsel of record. Petitioner is advised of his right to appeal this decision.

1 February 1993 /s/ James H. Chamblin
Date James H. Chamblin,
Judge

EVANS-SMITH, WILLIAM, PETITIONER
vs.
TAYLOR, JOHN B., WARDEN

93-1195

SUPREME COURT OF THE UNITED STATES

127 L. Ed. 2d 567

March 7, 1994

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF VIRGINIA, LOUDOUN COUNTY.

JUDGES

Rehnquist, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg.

OPINION

The petition for writ of certiorari is denied.

Select testimony from R. 718 and R. 1176 (Dr. Byer's testimony concerning the panties found in the victim's mouth).

R. 718:

A. ...there was a pair of white underpants that had been stuffed in the mouth....

Q. (Prosecution) Let me ask you for a second about the pants which you indicate were in the mouth. What did you notice about the manner in which those were in the decedent's mouth?

A. They were in the mouth or the oral cavity, but they could be removed rather easily. in other words, they weren't, what I would characterize as being tightly stuffed into the mouth.

....

Q. When one dies in that manner, can you state whether or not that is likely to produce any blood on something which would be in the mouth such as these panties?

A. With death ensuing in this manner, one would get what we term pulmonary edema or fluid in the lungs. This then could come up the airway and could contaminate anything that's in the oral cavity or the mouth.

Q. All right, would that show up as blood, then?

A. Yes.

Q. When would that happen relevant to death?

A. It would happen during the placement of the ligature or it could happen in the postmortem state, particularly with movement of the body if it's moved from a position where it's on its back to one where it's on its front.

R. 1776:
(Stipulation read by the Court)

"I have reviewed the photographs of Barbara Evans-Smith. The material which looks like blood in the ear I think came from her mouth. I can say that to a reasonable medical certainty.

I suspect it is the same material that discolored the underpants which were sent to the lab. That fluid came from the lungs. The fluid had the gross appearance of blood stained or blood tinged fluid. It would not have been straight blood. The material did not come from any open wound in, or near the ear.

The material could have flowed into the ear during the time the ligature was put on or at a substantially later time. I have no opinion as to when it actually happened.

If the material in the ear came from the mouth, the gag was placed in the

mouth after the initial discharge from the mouth because if the gag was there first, it would have undoubtedly absorbed the material.

The autopsy made no findings concerning this and, hence, it was not included in the autopsy report.

I would believe that the body was laying on the floor at the time this happened with the head turned to the left when the fluid ran into the ear.

It is my opinion to a reasonable medical certainty that this is what happened in view of the fact that there were no open wounds to account for the material in the ear. The fluid was not submitted for analysis."